Supreme Court, U.S.
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No. 02-113

In The

Supreme Court of the United States

MITCHELL SCATES, JR.,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Circuit correctly interpreted 38 U.S.C. § 5904(d)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Federal Circuit is published as 282 F.3d 1362 (Fed. Cir. 2002) and reprinted in the Appendix ("App.") at App. 1.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on June 11, 2002.

PROVISIONS INVOLVED

38 U.S.C. § 5904. **Recognition of agents and attorneys generally**

(c)(1) Except as provided in paragraph (3), in connection with a proceeding before the Department with respect to benefits under the laws administered by the Secretary, a fee may not be charged, allowed or paid for services of agents and attorneys with respect to services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case.

Such a fee may be charged, allowed or paid in the case of services provided after such date only if an agent or attorney is retained with respect to such case before the end of the one-year period beginning on that date. The limitation in the preceding sentence does not apply to services provided with respect to proceedings before a court.

(c)(2) A person who, acting as an agent or attorney in a case referred to in paragraph (1) of this subsection, represents a person before the Department or the Board of Veterans' Appeals after the Board first makes a final decision in the case shall file a copy of any fee agreement between them with the Board at such time as may be specified by the Board. The Board, upon its own motion or at the request of either party, may review such a fee agreement and may order a reduction in a fee called for in the agreement if the Board finds that the fee is excessive or unreasonable. A finding or order of the Board under the preceding sentence may be reviewed by the United States Court of Appeals for Veterans Claims under section 7263(d) of this title.

(d)(1) When a claimant and an attorney have entered into a fee agreement described in paragraph (2) of this subsection, the total fee payable to the attorney may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim.

(d)(2)(A) A fee agreement referred to in paragraph (1) is one under which the total amount of the fee payable to the attorney –

(i) is to be paid to the attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim; and

(ii) is contingent on whether or not the matter is resolved in a manner favorable to the claimant.

(d)(2)(B) For purposes of subparagraph (A) of this paragraph, a claim shall be considered to have been resolved in a favorable manner to the claimant if all or any part of the relief sought is granted.

(d)(3) To the extent that past-due benefits are awarded in any proceeding before the Secretary, the Board of Veterans' Appeals, or the United States Court of Appeals for Veterans Claims, the Secretary may direct that payment of any attorneys' fee under a fee agreement described in paragraph (1) of this subsection be made out of such past-due benefits. In no event may the Secretary withhold for the purpose of such payment any portion of benefits payable for a period after the date of the final decision of the Secretary. the Board of Veterans' Appeals, or the Court of Appeals for Veterans Claims making (or ordering the making of) the award.

38 C.F.R. § 20.609(e) *Fees permitted*. Fees permitted for services of an attorney-at-law or agent admitted to practice before the Department of Veterans Affairs must be reasonable. They may be based on a fixed fee, hourly rate, a percentage of benefits recovered, or a combination of such bases. Factors considered in determining whether fees are reasonable include:

(1) The extent of type of services the representative performed;

(2) The complexity of the case;

(3) The level of skill and competence required of the representative in giving the services;

(4) The amount of time the representative spent on the case;

(5) The results the representative achieved, including the amount of any benefits recovered;

(6) The level of review to which the claim was taken and the level of review at which the representative was retained;

(7) Rates charged by other representatives for similar services; and

(8) Whether, and to what extent, the payment of fees is contingent upon the results achieved.

38 C.F.R. § 20.609(f) *Presumption of reasonableness.* Fees which total no more than 20 percent of any past-due benefits awarded, as defined in paragraph (h)(3) of this section, will be presumed to be reasonable.

38 C.F.R. § 20.609(h) *Payment of Fees by Department of Veterans Affairs directly to an attorney-at-law from past-due benefits.*

(1) Subject to the requirements of the other paragraphs of this section, including paragraphs (c) and (e), the claimant or appellant and an attorney may enter into a fee agreement providing that payment for the services of the attorney-at-law will be made directly to the attorney-at-law by the Department of Veterans Affairs out of past-due benefits awarded as a result of a

successful appeal to the Board of Veterans' Appeals or an appellate court or as a result of a reopened claim before the Department following a prior denial of such benefits by the Board of Veterans' Appeals or an appellate court. Such an agreement will be honored by the Department only if the following conditions are met:

(i) The total fee payable (excluding expenses) does not exceed 20 percent of the total amount of the past-due benefits awarded,

(ii) The amount of the fee is contingent on whether or not the claim is resolved in a manner favorable to the claimant or appellant, and

(iii) The award of past-due benefits results in a cash payment to a claimant or an appellant from which the fee may be deducted. (An award of past-due benefits will not always result in a cash payment to a claimant or an appellant. For example, no cash payment will be made to military retirees unless there is a corresponding waiver of retirement pay. (*See* 38 U.S.C. § 5304(a) and § 3.750 *et seq*. of this chapter.))

(2) For purposes of this paragraph, a claim will be considered to have been resolved in a manner favorable to the claimant or the appellant if all or part of the relief sought is granted.

(3) For purposes of this paragraph, "past-due benefits" means a non-recurring payment resulting from a benefit, or benefits, granted on appeal or awarded on the basis of a claim reopened after a denial by the Board of Veterans' Appeals or the lump sum payment which represents the total amount of recurring cash payments which

accrued between the effective date of the award, as determined by applicable laws and regulations, and the date of the grant of the benefit by the agency of original jurisdiction, the Board of Veterans' Appeals, or appellate court.

(i) When the benefit granted on appeal, or as the result of the reopened claim, is service connection for a disability, the "past-due benefits", will be based on the initial disability rating assigned by the agency of original jurisdiction following the award of service connection. The sum will equal the payments accruing from the effective date of the award to the date of the initial disability rating decision. If an increased evaluation is subsequently granted as a result of an appeal of the disability evaluation initially assigned by the agency of original jurisdiction, and if the attorney-at-law represents the claimant or appellant in that phase of the claim, the attorney-at-law will be paid a supplemental payment based upon the increase granted on appeal, to the extent that the increased amount of disability is found to have existed between the initial effective date and the award following the grant of service connection and the date of the rating action implementing the appellate decision granting the increase.

(ii) Unless otherwise provided in the fee agreement between the claimant or appellant and the attorney-at-law, the attorney-at-law's fees will be determined on the basis of the total amount of past-due benefits even though a portion of those benefits may have been apportioned to the claimant's or appellant's dependents.

(iii) If an award is made as the result of favorable action with respect to several issues, the past-due benefits will be calculated only on the basis of that portion of the award which results from action taken on issues concerning which the criteria in paragraph (c) of this section have been met.

(4) In addition to filing a copy of the fee agreement with the Board of Veterans' Appeals as required by paragraph (g) of this section, the attorney-client must notify the agency of original jurisdiction within 30 days of the date of execution of the agreement of the existence of an agreement providing for direct payment of fees out of any benefits subsequently determined to be past due and provide that agency with a copy of the fee agreement.

38 C.F.R. § 20.609(i) *Motion for review of fee agreement.* The Board of Veterans' Appeals may review a fee agreement between a claimant or an appellant and an attorney-at-law or agent upon its own motion or upon the motion of any party to the agreement and may order a reduction in the fee called for in the agreement if it finds that the fee is excessive or unreasonable in light of the standards set forth in paragraph (e) of this section. Such motions must be in writing and must include the name of the veteran, the name of the claimant or appellant if other than the veteran (e.g., a veteran's survivor, a guardian or a fiduciary appointed to receive VA benefits on the individual's behalf), and the applicable Department of Veterans Affairs file number. Such motions must set forth the reason, or reasons, why the fee called for in the fee agreement is excess or unreasonable. Such motions (other than motions by the Board) must be filed at the following address: Office

of the Senior Duty Vice Chairman (O12), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. They should be accompanied by all such evidence as the moving party desires to submit. The moving party must mail a copy of the motion and accompanying evidence to all other parties to the agreement, with return receipts requested. The receipts, which must bear the signatures of the other parties, must then be filed with the Board at the same address as proof of service of the motion. The other parties may file a response to the motion, with any accompanying evidence, with the Board at the same address no later than 30 days following the date of receipt of the copy of the motion. A copy of any such response and any accompanying evidence must be mailed to the moving party, with a return receipt requested. The receipt, which must bear the signature of the moving party, must then be filed with the Board at the same address as proof of service of the response. Once there has been a ruling on the motion, an order shall issue which will constitute the final decision of the Board with respect to the motion. If a reduction in the fee is ordered, the attorney must credit the account of the claimant or the appellant with the amount of the reduction and refund any excess payment on the account to the claimant or appellant not later than the expiration of the time within which the ruling may be appealed to the United States Court of Appeals for Veterans Claims. Failure to do so may result in proceedings under § 14.633 of this chapter to terminate the attorney's or the agent's right to practice before the Department of Veterans Affairs and the Board of Veterans' Appeals and/or prosecution under the provisions of 38 U.S.C. 5905.

STATEMENT OF THE CASE

This case involves the attorney fee provisions regarding representation of claimants or appellants in proceedings before the Department of Veterans Affairs, the Board of Veterans' Appeals, or the United States Court of Appeals for Veterans Claims. The veteran, Mr. Scates, in this case entered into a fee agreement with the attorney, Mr. Mason, during the pendency of proceedings before the United States Court of Appeals for Veterans Claims. The fee agreement entered into between Mr. Scates and Mr. Mason conformed in all respects to the statutory and regulatory requirements set out in 38 U.S.C. § 5904(d) and 38 C.F.R. § 20.609.

Mr. Mason successfully represented the veteran in proceedings before the United States Court of Appeals for Veterans Claims. As a result of the successful representation at Court, the denial of service connection which had been made by the Board of Veterans' Appeals had been vacated and remanded for readjudication. Mr. Mason continued the representation of Mr. Scates following the successful representation at Court, in the continuing proceedings, involving the readjudication of Mr. Scates' claim, before the Board of Veterans' Appeals. Mr. Mason was again successful in obtaining a remand from the Board returning the matter to the Agency of Original Jurisdiction for further proceedings.

Unfortunately, these administrative proceedings before the Regional Offices of the Department of Veterans Affairs were protracted. In fact, Mr. Scates' claims file was transferred from the Regional Office in California to the Regional Office in Tennessee, due to Mr. Scates' relocation from California to Tennessee. In June of 1994, Mr. Scates

terminated Mr. Mason's representation of him by appointing a National Service Organization, the Veterans of Foreign Wars. This was nearly three and one-half years after the fee agreement was entered into in January of 1991 and following successful representations before the Court and the Board, but prior to any award of past-due benefits.

It is important to understand that it was Mr. Mason's successful representation of Mr. Scates before the United States Court of Appeals for Veterans Claims which provided the opportunity for the reinstatement of his previously denied claim for service connection, by returning that claim to the Board of Veterans' Appeals and to the Agency for readjudication. But for, the successful representation by Mr. Mason of Mr. Scates before the Veterans' Court, Mr. Scates would have been required, pursuant to 38 U.S.C. § 5108, to submit new and material evidence to reopen his claim for service connection based upon the denial of service connection in the Board decision vacated by the Veterans' Court.

Further, pursuant to VA regulations, even if Mr. Scates had been thereafter successful in reopening his claim for service connection the effective date would have been no earlier than the date of the reopened claim. *See* 38 C.F.R. §§ 3.400(q) and (r). Therefore, as a direct result of Mr. Mason's representation of Mr. Scates before the Veterans' Court, the effective date of Mr. Scates' claim for service connection was assigned June of 1988. Had Mr. Mason's representation not resulted in the vacating of the 1990 BVA decision, any effective date for an award of past-due benefits would have been after 1993 or later depending upon when Mr. Scates filed to reopen after his 1990 BVA decision had been affirmed by the Veterans' Court.

In March of 1996, nearly three years after terminating Mr. Mason, Mr. Scates was, as a result of Mr. Mason's successful representation before the Veterans' Court, awarded service connection by the Regional Office in Tennessee. Pursuant to statute and regulation, Mr. Mason's attorney fees were withheld from Mr. Scates' award of past-due benefits from June of 1988. Thereafter, the Board of Veterans' Appeals reviewed the fee agreement between Mr. Scates and Mr. Mason and held that the fee agreement satisfied all requirements for receiving a fee and directed that the attorney's fee be paid by the Secretary.

Mr. Scates then appealed the Board's decision to the United States Court of Appeals for Veterans Claims. In a Panel decision, the Veterans' Court reversed the Board, holding that under New York law Mr. Scates' termination of Mr. Mason extinguished Mr. Mason's right to the contingent fee. The original Panel decision was vacated and thereafter heard by the *en banc* United States Court of Appeals for Veterans Claims which held that the Board of Veterans' Appeals did not have original jurisdiction to consider "any issues regarding entitlement to attorney fees in direct-payment cases." The *en banc* Veterans' Court held, "all issues involving entitlement or eligibility for attorney fees under direct-payment contingency-fee agreements must be addressed by the Regional Office in accordance with the normal adjudication procedures and cannot be subject to a *sua sponte* or other original (on motion) BVA review." Mr. Mason appealed the *en banc* decision of the United States Court of Appeals for Veterans Claims to the United States Court of Appeals for the Federal Circuit. Mr. Mason argued that pursuant to the fee agreement entered into between himself and Mr.

Scates, which conformed in all respects to the statutory and regulatory requirements, entitled him to direct payment of his attorney fees without being required to be subjected to an adjudication procedure, not authorized, required, or necessary, as mandated by the Veterans' Court's decision.

The United States Court of Appeals for the Federal Circuit misinterpreted 38 U.S.C. § 5904(d)(1) to limit the total fee payable to an attorney to 20 percent of the "past due benefits award." Further, the Panel decision held that the Veterans' Court had properly authorized Mr. Scates to participate in a Regional Office proceeding to determine Mr. Mason's right to a fee. The Federal Circuit erroneously concluded that the Regional Office proceeding would be similar to a Board proceeding under 38 U.S.C. § 5904(c)(2).

It is from this decision that the Petitioner seeks relief from this Court in his Petition.

REASONS FOR GRANTING THE WRIT

Prior to November of 1988, attorney fees were limited by statute to Ten Dollars ($10.00). This fee limitation goes all the way back to the Civil War. With the enactment of the Veterans Judicial Review Act (VJRA), in 1998, the Congress made a fundamental change in public policy. Under the VJRA, Congress permitted for the first time since the Civil War, attorneys to enter into fee agreements with veterans or other claimants seeking benefits from the Department of Veterans Affairs to charge a fee in excess of Ten Dollars.

Congress enacted a unique attorney fee statute for this purpose. First, it constrained the right to enter into an attorney fee agreement until after a first final decision of the Board of Veterans' Appeals. Second, it created an incentive to attorneys who were willing to represent veterans or other eligible claimants before the Department of Veterans Affairs, to include the Board of Veterans' Appeals, or the United States Court of Appeals for Veterans Claims. The incentive created was that in consideration for attorneys willing to agree to enter into a contingent fee agreement, that would limit the fee to be charged to twenty percent or less, that Congress would direct the Secretary of the Department of Veterans Affairs to pay directly to such attorneys the agreed upon attorney fee.

The current opinion of the United States Court of Appeals for the Federal Circuit misreads and misapprehends the purpose and intent of 38 U.S.C. § 5904(d). As the facts of this case demonstrate, the representation of veterans or other eligible claimants before the United States Court of Appeals for Veterans Claims, the Board of Veterans' Appeals, or the Regional Offices of the Department of Veterans Affairs is more often than not a profoundly protracted and extended process. The consequence of the misinterpretation of the attorney fee agreement statute by the Federal Circuit is that an attorney with a frustrated, recalcitrant, or angry client can be forced to be subjected to an agency adjudicatory process to defend and justify the right to the fee provided for in the fee agreement. A fee agreement entered into in compliance with the statute which provided for the direct payment by the Secretary of the fee called for in that fee agreement, in the

event of an award of past-due benefits resulting from successful representation by the attorney.

Appellant respectfully submits that the Panel decision of March 13, 2002 misread and misapprehended the purpose, meaning and intent 38 U.S.C. § 5904(d). The Panel also failed to correctly interpret 38 U.S.C. §§ 5904(c) and (d). Further, that the Federal Circuit's decision failed to defer to the interpretations made by the Secretary of the Department of Veterans Affairs, in regulation.

The Panel decision fails to recognize the clear differences which exist between fee agreements under 38 U.S.C. §§ 5904(c)(2) and 5904(d). Under § 5904(c)(2), fee agreements are **not limited** as to the fee structure or as to the amount of fee which may be charged **except** that the fees called for may not be **excessive or unreasonable**. Under § 5904(d), fee agreements, must be **contingent in nature** and **limit** the amount of the fee to 20 percent or less, to be **eligible** for **direct payment** from the Secretary. This subsection of the statute provides for **no** review process.

38 U.S.C. § 5904(c)(2) **does provide** for a **review** process for fee agreements covered by that statute. But that review is in the context of whether that fee amount is **excessive or unreasonable**. Section 5904(c)(2) **does not** describe or provide for a **role** for either the Board of Veterans' Appeals **or** the Secretary in the review of fee agreements under § 5904(d). The Panel's decision has, without basis within either § 5904(c)(2) or § 5904(d) affirmed the creation of an administrative review process for § 5904(d) fee agreements under the provisions of § 5904(c)(2).

There is no statutory authority to require Mr. Mason, or any other attorney, to make a "fee claim" to the Agency

in order to obtain **direct payment** of a fee pursuant to a fee agreement entered into under 38 U.S.C. § 5904(d). Any attorney, who has a fee agreement which conforms with the express provisions of 38 U.S.C. § 5904(d), is entitled to **direct payment** of the fee called for in that fee agreement by operation of law. There is nothing in the plain language of § 5904(c)(2) or the relevant regulations which describes or otherwise characterizes any proceeding under the statute or regulation in terms of a "attorney fee dispute" or "attorney fee claim," particularly as regards § 5904(d) fee agreements. To the contrary, the language of § 5904(c)(2) describes **only** a limited role for the Board of Veterans' Appeals, in fee agreements generally and describes **no role** for the Board regarding review of § 5904(d) fee agreements.

The Panel in its discussion of 38 U.S.C. § 5904(d) notes the "limit [of] the total fee payable to an attorney to twenty percent of the 'past-due benefits awarded.'" *Scates v. Principi*, 282 F.3d 1362, 1365 (Fed. Cir. 2002). However, 38 U.S.C. § 5904(c)(2) **does not** limit the amount of the percentage of the fee from past-due benefits which may be charged by an attorney. *See* 38 C.F.R. § 20.609(e). The **only** constraining criteria regarding the amount of fee **expressly** set out in § 5904(c)(2) is that the fee "called for in the agreement" be either "excessive or unreasonable." But, this pertains to fee agreements entered into under § 5904(c)(2) and **not** fee agreements entered into under § 5904(d). Compare the statutorily created limitations imposed on fee agreements under § 5904(d), to the Secretary's interpretation of § 5904(c)(2) fee agreements, in regulation at 38 C.F.R. § 20.609(e) which **permit** fees for services to be based on a "fixed fee, hourly rate, a percentage of benefits recovered or a combination of such bases."

Clearly under this regulation the Secretary **does not interpret** § 5904 to "limit the total fee payable to twenty percent of past-due benefits."

The Federal Circuit Panel **overlooked** the Secretary's interpretation of the statute found in 38 C.F.R. § 20.609(e). Contrary to the Panel's conclusion regarding the imposition of a specific limitation by statute on the amount of the total fee, § 5904(c)(2) requires **only** that the fees charged "must be reasonable." The Secretary's interpretation of the statute conflicts with the Panel decision's interpretation that the statute "thus limits the total fee payable to an attorney to twenty percent of 'past-due benefits awarded.'" *Scates* at 1365.

The decision below further misreads the intent and purpose of the statutory scheme set out in 38 U.S.C. § 5904(d). 38 U.S.C. § 5904(d) provides for a **separate** and **distinct** fee process from the process described in § 5904(c)(2). A § 5904(d) fee agreement does not require review of the **amount of the fee called for** in the fee agreement as described in 38 U.S.C. § 5904(c)(2), because § 5904(d) sets the amount and limit of the fee.

38 U.S.C. § 5904(d) provides for the **direct payment** by the Secretary of a contingent fee of twenty percent or less from an award of past-due benefits. Congress created the **direct payment** provisions in § 5904(d) as an inducement to attorneys, **but** requires that attorneys **limit** the amount of the fee to be charged to a veteran for representation and that the fee agreement must be **contingent**. The express purpose of this statute was to encourage attorney representation of veterans under statutorily described terms, in consideration for the

Secretary providing for the **direct payment** of the attorney fees from the award of past-due benefits. Mr. Scates entered into a fee agreement with Mr. Mason which conformed with the provisions of 38 U.S.C. § 5904(d). The CAVC in its *en banc* decision created out of whole cloth a procedure for the review of § 5904(d) fee agreements which **does not exist** within the statutory scheme. The plain language of 38 U.S.C. § 5904(d) **does not** provide any authority or any support for the proposition that a veteran, who has entered into a fee agreement which conforms with § 5904(d), has the right at any time after the award of past-due benefits, to challenge anything about the fee agreement entered into under § 5904(d), under the 38 U.S.C. § 5904(c)(2) criteria in an administrative proceeding before the Agency.

The Federal Circuit's decision affirms the CAVC's decision, stating that:

> Because that percentage was less than contingent fees typically found in other areas of practice, Congress gave lawyers the offsetting benefit of certainty of collection; it provided for the Department to withhold that percentage from the benefits awarded and itself pay the fee directly to the lawyer. *Scates* at 1366.

This statement is only partially correct. Congress did provide for **direct payment** by the Agency to the attorney. Congress, however, cannot be said to have contemplated an administrative review by the Agency of Original Jurisdiction regarding the amount of the fee called for in § 5904(d) fee agreements. Section 5904(d) contemplates **only** that the Secretary will make a **direct payment** of fees earned by the attorney from the award of past-due benefits, when such fee agreement conforms with the

requirements set out in the statute. There is nothing in the plain language of either 38 U.S.C. §§ 5904(c)(2) and (d) which implicate or otherwise mandate the review of a § 5904(d) fee agreement at the administrative level under the § 5904(c)(2) criteria.

The Federal Circuit's decision offers no authority for its conclusion that Congress intended the review of a § 5904(d) fee agreement under § 5904(c)(2) in order to address the impact of the attorney's "discharge by the client before the case is completed" or whether the fee **agreed to** by the veteran under § 5904(d) "fairly and accurately reflects his (the attorney's) contribution to and responsibility for the benefits awarded." *Scates* at 1366. The Federal Circuit misreads § 5904(d). The reflection of the attorney's contribution and responsibility for the award of past-due benefits is set out in both the statute and the regulation. 38 U.S.C. § 5904(d)(2)(A)(ii) clearly states that the fee agreement referred to in paragraph (1) of the statute "is contingent on whether or not the matter is resolved in a manner favorable to the claimant." Subparagraph (B) states clearly that for purposes of subparagraph (A), "a claim **shall be** considered to have been resolved in a favorable manner to the claimant if all or any part of the relief sought is granted." (Emphasis added) *See* 38 U.S.C. § 5904(d)(2)(B); *see also* 38 C.F.R. § 20.609(h)(2).

Mr. Scates' claim was "resolved in a favorable manner" to him, first, when the 1990 Board decision was vacated at the Veterans' Court as a result of the successful representation by Mr. Mason. Mr. Scates' claim was "resolved in a favorable manner" to him, next, when the Agency in 1996 granted him service connection and awarded him past-due benefits to June of 1988. Therefore, pursuant to the plain language of 38 U.S.C. § 5904(d)(3), "To the extent that

past-due benefits are awarded **in any proceeding** . . . the Secretary may direct that the payment of **any attorney fee under a fee agreement described in paragraph (1) of this subsection be made out of such past-due benefits.**" (Emphasis added)

38 U.S.C. § 5904(d) provides for the **direct payment** of attorney fees by the Secretary out of past-due benefits of the claimant. It does not provide for or otherwise contemplate an "attorney fee dispute" process or a process involving a claim for "attorney fees." There simply is no authority within the text of § 5904(d) for a claimant to challenge a statutorily created fee agreement, voluntarily entered into, under the terms and conditions set out in 38 U.S.C. § 5904(d).

The fee agreement to be entered into by a veteran/claimant with an attorney under 38 U.S.C. § 5904(d) is clearly and precisely as defined by that statute. 38 U.S.C. § 5904(d)(1) states:

> When a claimant and an attorney **enter into a fee agreement** described in paragraph 2 of this subsection, the **total fee payable** may not exceed 20 percent of the total amount of past-due benefits awarded on the basis of the claim. (Emphasis added)

This statute must be read as **binding** on both the claimant and the attorney. The attorney is required by the statute to conform the compensation called for in the fee agreement to be **both** contingent and in an amount not to exceed 20 percent of the total past-due benefits. Equally, the claimant **has contractually agreed** to pay to the attorney **up to** 20 percent of the past-due benefits **awarded** on the basis of the claim. The creation of an

attorney fee claim or dispute process is **inconsistent** with the plain language of the statute. An attorney fee claim or dispute process would necessarily **modify** the legal liability of the claimant as provided for under § 5904(d) to allow the Secretary to make **direct payment** to the attorney of the **agreed upon** fee.

The decision below concludes:

> Thus, the Board has jurisdiction over appeals involving contingent fee contracts under which the attorney is to receive up to "20 percent of the amount of any past-due benefits awarded on the basis of the claim" and the Secretary is to pay that fee to the attorney out of those benefits. *See* 38 U.S.C. § 5904(d)(1)(2)(A)(i), (ii). *Scates* at 1367.

This conclusion misapprehends and misunderstands the purpose of the Board's jurisdiction under 38 U.S.C. § 5904(c)(2). The purpose of § 5904(c)(2) is to review fee agreements **other than** those entered into under § 5904(d). Congress **expressly limited** the Board's jurisdiction to include **only** "the fee called for in the agreement," and **expressly directs** that the focus of such inquiry shall be on whether "that fee is **excessive or unreasonable**." The fee **called for** in a § 5904(d) fee agreement is presumed reasonable. *See also* 38 C.F.R. § 20.609(f).

The Panel decision of the Federal Circuit commits the same error as the Veterans' Court in its *en banc* decision. Both decisions have made the **unwarranted leap** from 38 U.S.C. § 511(a) to 38 U.S.C. § 5904(c)(2) to require § 5904(d) fee agreements to be subject to review under the § 5904(c)(2) criteria by the Agency. Section 5904(c)(2) fee

agreements are **distinguishable** from the fee agreements entered into for **direct payment** by the Secretary under § 5904(d). Section 5904(c)(2) fee agreements are **distinguishable** because they may be based upon: an hourly rate, a fixed fee, a contingent fee in excess of twenty percent, or a combination of any or all of these bases. Section 5904(c)(2) fee agreements are subject to review by the Board of Veterans' Appeals for excessiveness or unreasonableness because those fee agreements **have not** limited the fee called for in the fee agreement to a contingent fee of 20 percent or less. Because § 5904(d) fee agreements are interpreted by the Secretary to be **presumptively reasonable**, they cannot be **excessive**. Therefore, § 5904(d) fee agreements are **entitled to direct payment** by the Secretary, without review of the fee called for in the fee agreement, since that fee is **presumed reasonable**.

Mr. Mason **obtained** the relief sought by the veteran in his appeal to the CAVC. The Board of Veterans' Appeals decision appealed by Mr. Scates to the Veterans' Court had **denied** service connection to Mr. Scates. That Board decision would have become **final** but for Mr. Mason's success at the Veterans' Court in vacating that Board decision and obtaining a Court ordered remand for the readjudication of Mr. Scates' claim for service connection. *See* 38 U.S.C. §§ 5904(d)(2)(A) and (B). As a result of Mr. Mason's representation, Mr. Scates was eventually awarded past-due benefits. Consistent with the provisions of 38 U.S.C. § 5904(d)(3), the resulting award of past-due benefits **entitled** Mr. Mason to the **direct payment** of his fee by the Secretary.

The Federal Circuit's decision provides **no basis** within the statutory scheme or within existing VA regulations to support the conclusion that the **direct payment** of fees described in § 5904(d) are subject to any form of Agency or administrative review under a § 5904(c)(2) criteria. To further demonstrate this point, Mr. Mason relies upon the Secretary's interpretation of 38 U.S.C. § 5904(d) as found in 38 C.F.R. § 20.609(f) which states in pertinent part:

> Fees which total **no more than** twenty percent of past-due benefits awarded as defined in paragraph (h)(3) of this section, **will be presumed to be reasonable**. (Emphasis added)

38 C.F.R. § 20.609(h) describes, "Payment of fees by Department of Veterans Affairs **directly** to an attorney-at-law from past-due benefits." Both of these regulations constitute the Secretary's **interpretation of** 38 U.S.C. § 5904(d) and by implication § 5904(c)(2). Neither regulation requires a § 5904(c)(2) type of review for § 5904(d) fee agreements by the Agency.

Contrary to the Federal Circuit's interpretation of the statute, the Secretary's **interpretation** of the statute **does not contemplate** or otherwise authorize or require the Agency to conduct an administrative review of a **direct payment** fee agreement under 38 U.S.C. § 5904(d). The Secretary's **regulatory presumption** that a fee of twenty percent or less, as is required of the fee called for in a **direct payment fee agreement**, as described in 38 C.F.R. § 20.609(h)(3), **negates** any need for **any review** of such a § 5904(d) fee agreement under a § 5904(c)(2) criteria by the Agency. The Secretary has created **no regulatory provision** authorizing that there be any type

of an administrative review of a **presumptively reasonable fee**, called for in a § 5904(d) fee agreement.

The Federal Circuit concluded that, "There is no reason to believe that Congress intended to preclude the claimant from participating in the Regional Office proceeding and the Veterans' Court did not err in permitting such participation." *Scates* at 1369. It is equally true that there is **no reason** to believe that Congress **intended** to include claimants in a proceeding before the Regional Office which was not **expressly provided for** by any statute. The Federal Circuit should have assumed to the contrary that Congress was capable of articulating such intent, and did not. The Secretary's interpretations of § 5904(c)(2) and § 5904(d) in regulation supports Mr. Mason's position that § 5904(d) fee agreements are not intended or required to be reviewed by the Agency under § 5904(c)(2) type review process. The Federal Circuit erred by failing to properly consider the Secretary's interpretation of the statute and deferred to those interpretations as found in regulation. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

CONCLUSION

38 U.S.C. § 5904(d) may well be a poorly written even ambiguous statute. There may be inherent problems as expressed by both the Veterans' Court and the Federal Circuit in the consequences to veterans who enter into fee agreements under this statute. But there is nothing in the plain language of the statute to require, anything other than the ministerial act of the agency to confirm the written fee agreement's compliance with the requirements

of the statute and the regulation. Once such ministerial review is complete, the statute requires the **direct payment** of the fee called for to be made by the Secretary to the attorney. The statute **does not** require or need an administrative review of the fee agreements described therein. The statute **requires** only an operation of law by the Agency to **confirm** that the statutory requirements have been met.

There have been fewer than twenty-five hundred attorneys across the nation who have been admitted to the United States Court of Appeals for Veterans Claims. There are fewer than two to three hundred attorneys who regularly practice in this area. Yet, there are two million claims or more a year filed with the Department of Veterans Affairs. The Board of Veterans' Appeals makes between forty and fifty thousand decisions a year. There are fewer than two thousand cases a year filed at the United States Court of Appeals for Veterans Claims.

The veterans population is already underrepresented by attorneys, willing to endure this perpetually delayed and protracted process of adjudication. Congress created in 38 U.S.C. § 5904 an incentive to encourage attorneys willing to represent veterans before the newly created court and the agency. The decision of the *en banc* Veterans' Court and by the Panel of the Federal Circuit will have a chilling effect upon the already limited number of attorneys willing to wait the many years necessary for a final award of past-due benefits. The Federal Circuit's interpretation of § 5904(d) will extend that waiting period, as it has done in this case, to more than a decade.

Congress required under § 5904(d) that attorneys be required to wait for the payment of their contingent fees

until the Agency or the Court awarded the veteran past-due benefits. Congress **did not** require or contemplate requiring that attorneys would be further subjected to an unnecessary administrative review process **after** the award of past-due benefits had been made to the veteran. The statute contemplates the **direct payment** out of the veteran's past-due benefits to be made to the attorney at the same time as the payment of the award of past-due benefits to the veteran.

The Federal Circuit's interpretation is wrong and must be corrected by this Court.

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

01-7033

MITCHELL SCATES, JR.,

Claimant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee,

v.

KENNETH B. MASON, JR.,

Intervenor-Appellant.

John S. Groat, Attorney, Civil Division, Department of Justice, of Washington, DC, argued for respondent-appellee. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General; *David M. Cohen*, Director; and *Robert E. Kirschman*, Assistant Director. Of counsel on the brief were *Donald E. Zeglin*, Deputy Assistant General Counsel; and *Michael J. Timinski*, Attorney, Department of Veterans Affairs, of Washington, DC. Of counsel was *Michael A. Leonard*, Department of Veterans Affairs, of Washington, DC.

Kenneth M. Carpenter, Carpenter, Chartered, of Topeka, Kansas, argued for intervenor-appellant.

Appealed from: United States Court of Appeals for Veterans Claims

Former Chief Judge Frank Q. Nebeker

United States Court of Appeals
for the Federal Circuit

01-7033

MITCHELL SCATES, JR.,

Claimant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee,

v.

KENNETH B. MASON, JR.,

Intervenor-Appellant.

DECIDED: MARCH 13, 2002

Before NEWMAN, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and RADER, *Circuit Judge*.

FRIEDMAN, *Senior Circuit Judge*.

A lawyer who formerly represented a veteran in his claim before the Department of Veterans Affairs ("Department") for benefits seeks twenty percent of the past benefits the Department awarded the veteran. His claim is based upon his retainer agreement with the veteran providing that amount as the lawyer's fees. During the proceedings before the Department, however, the veteran terminated the lawyer's representation and substituted a veterans organization, which pursued the case to its successful conclusion.

The question before us is which component of the Department – the Board of Veterans' Appeals ("Board") or the Regional Office – should decide initially the lawyer's claim. The Court of Appeals for Veterans Claims ("Veterans Court") held that the Board has jurisdiction to determine only the reasonableness of (but not the lawyer's entitlement to) the fee, and remanded the case to the Board to dismiss and for the Regional Office initially to determine the lawyer's entitlement to a fee. We modify the remand order and, as modified, affirm it.

I

The appellant Mason, an attorney, entered into a "Fee retainer contract" in January 1991 with the veteran Scates to represent Scates in his claim for benefits before the Department and the Veterans Court. In the contract Scates "agree[d] to pay a 'Contingent Fee' equal to 20% (Twenty Percent) of the total amount of any past-due benefits awarded on the basis of your claim with the Department of Veterans Affairs (DVA). It is understood that this Contingent Fee is to be paid by the DVA directly to me from any past due benefits awarded to you."

Scates and Mason amended their representation agreement in April 1993. The new agreement substituted the following paragraphs relating to the contingent fee arrangement:

> If there is a recovery of benefits, I agree to pay you a fee contingent upon the outcome of the matter or proceeding described in paragraph 1. I agree to pay you a fee equal to twenty percent (20%) of the total amount of any past-due VA disability benefits awarded by judgment, settlement or administrative action on the basis of my (the

client's) claim with the U.S. Department of Veterans Affairs.

If there is an award of attorney fees under the Equal Access to Justice Act (EAJA), I (the client) agree to pay you (the attorney) that part of the EAJA award that, when added to the twenty percent (20%) of the past due disability benefits, raises the total fee earned by you to the following level: The number of hours of time expended on this case multiplied by $350 per hour, which is two times your normal $175 hourly rate for non-contingency work. I agree and acknowledge because of the contingency nature of my case, $350 per hour is a reasonable rate.

I HEREBY ORDER AND DIRECT DVA TO WITHHOLD TWENTY PERCENT (20%) OF PAST DUE BENEFITS PAYABLE TO ME AND TO PAY SUCH AMOUNT TO YOU FOR ATTORNEY'S FEE. . . .

If, for any reason, the Department of Veteran [sic] Affairs fails to follow my order and direction, I promise and agree to pay the contingent fee, less the advance retainer, directly to you.

In June 1994, Scates terminated Mason's representation, and appointed the Veterans of Foreign Wars as his representative. The Regional Office notified Mason of this change and told him that the April 1993 amended retainer agreement would be kept in Scates' file. The Regional Office stated that if past-due benefits subsequently were awarded, it would forward that agreement to the Board to determine whether Mason should receive any fee for his representation of Scates.

In March 1996, the Department awarded Scates benefits, including past-due benefits. The Regional Office, pending a decision by the Board on Scates' right to a fee, withheld twenty percent of the past-due benefits. The Board held that Mason had satisfied all the requirements for receiving his fee, and directed that he be paid. The Board ruled that Scates' revocation of Mason's authority to represent him did not preclude payment of "otherwise due" attorney fees.

On Scates' appeal, a divided panel of the Veterans Court reversed the Board. It held that under New York law Scates' termination of Mason's employment extinguished Mason's right to the contingent attorney fee.

The full court, however, granted rehearing en banc and vacated the panel decision. In its en banc opinion the Veterans Court held that "[b]ecause . . . the Board does not have original jurisdiction to consider . . . any issues regarding entitlement to attorney fees in direct-payment cases, . . . all issues involving entitlement or eligibility for attorney fees under direct-payment contingency-fee agreements, as contrasted with the issues of reasonableness and excessiveness, must first be addressed by the RO [Regional Office] in accordance with the normal adjudication procedures and cannot be the subject of sua sponte or other original (on motion) BVA review." It stated:

> The matter of attorney fees remains pending before the Secretary by virtue of the fee agreement filed in this case. After notice to the appellant and intervenor, and an opportunity to be heard, that claim should be decided by the RO. The aggrieved party may then file a Notice of Disagreement and pursue an appeal to the Board

> and this Court if so desired. . . . Our decision today does not decide the question of the effect of the termination of the attorney-client relationship between Mr. Mason and Mr. Scates and leaves that question for decision at the initial administrative level. Neither does the Court express any view as to the reasonableness or excessiveness of the fee called for in this agreement since the facts surrounding such issues must be developed in the adjudication of the pending claim. The Board's decision is VACATED for want of original jurisdiction to decide eligibility for direct payment of a withheld contingency fee under § 5904(d), and the matter is REMANDED to the Board with directions to dismiss the matter of direct-payment fee eligibility as referred to the Board by the RO. (citations omitted).

II

A. Mason contends that under his retainer agreement with Scates, and because he played a significant role in the litigation of this case, he is entitled to the twenty percent of the past-due benefits award that the Regional Office retained, even though Scates terminated his appointment during the Department proceedings. According to Mason, only the "ministerial" act of paying him the withheld money remains to be done to complete the resolution of this attorney fee dispute. Under Mason's analysis, there is therefore no occasion to remand this case to the Regional Office for further proceedings.

Mason's attorney fee claim cannot be disposed of so simply and easily.

In the amended representation agreement, Scates stated that "[i]f there is a recovery of benefits, I agree to

pay you a fee contingent upon the outcome of the matter or proceeding described in paragraph 1 . . . equal to twenty percent (20%) of the total amount of any past-due VA disability benefits awarded." Read in isolation, this provision could be interpreted as entitling Mason to that amount if benefits are recovered, without regard to how long Mason's employment continued or whether Scates terminated Mason's employment during the administrative proceedings and retained a substitute representative who continued to handle the claim.

Read in context and in the light of the statutory provisions governing the payment of attorney fees in veterans benefits cases, however, we conclude that implicit in this arrangement was the understanding that Mason's right to receive the full twenty percent of past due benefits would arise only if Mason continued as Scates' attorney until the case was successfully completed. If, as here, the veteran terminated the lawyer's services during the case and retained a substitute representative, the first lawyer's fees would be based upon and fairly reflect that lawyer's contribution to the case.

Under 38 U.S.C. § 5904(d)(1), (2), when a claimant and an attorney have entered into a contingent fee agreement under which "the total amount of the fee . . . (i) is to be paid to the attorney by the Secretary directly from any past due benefits awarded on the basis of the claim,"

> The total fee payable to the attorney may not exceed 20 percent of the total amount of any past due benefits awarded on the basis of the claim.

The statute thus limits the total fee payable to an attorney to twenty percent of the "past due benefits awarded." Under Mason's theory, if the veteran terminated

the attorney's services in the middle of the case, the total twenty percent maximum fee would be due to the first attorney. It would then be, at best, extremely difficult for the veteran to hire and pay a successor attorney to complete the case. This would be so even if the claimant dismissed his lawyer for unsatisfactory services (as the client has a right to do, *see Kenis v. Perini Corp.*, 682 A.2d 845, 849 (Pa. Super. Ct. 1996); *Campagnola v. Mulholland, Minion & Roe,* 555 N.E.2d 611, 614 (N.Y. 1990)). The veteran's only options would be attempting to procure a veterans organization to take on the case without charge, continuing the case pro se, or personally hiring and paying another lawyer to complete the case.

The history of the statutory provisions governing the payment of attorney fees in veterans benefits cases supports our conclusion that an attorney discharged during the case is entitled only to a fee reflecting his contribution to the litigation. Prior to 1988, the applicable statute was Civil War era legislation that limited attorney fees in veterans benefit claims cases to $10.00. *See In re Wick,* 40 F.3d 367, 368-69 (Fed. Cir. 1994). Congress then recognized that the $10.00 fee limit was so small as to effectively preclude veterans from employing lawyers to handle their benefits claims. *See Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 307-35 (1985); *Zuspann v. Brown,* 60 F.3d 1156, 1158-59 (5th Cir. 1995). The Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), reflects Congress' conclusion that claimants should be able to have legal representation in pursuing benefits claims. The Act permits lawyers to receive contingent fees of up to twenty percent of benefits recovered. Because that percentage was less than contingent fees typically found in

other areas of practice, Congress gave lawyers the offsetting benefit of certainty of collection; it provided for the Department to withhold that percentage from the benefits awarded and itself pay the fee directly to the lawyer.

Other statutory provisions similarly reflect congressional intent to protect veterans benefits from improper diminution by excessive legal fees. Section 5904(c)(2) requires that anyone representing a claimant before the Department or the Board after the Board first makes a final decision in the case must file a copy of any fee agreement with the Board, which may reduce any such fee that it finds to be "excessive or unreasonable." Section 5904(c)(3) permits "[a] reasonable fee" in connection with a Department proceeding relating to certain loans the Department has made, guaranteed or insured. Section 7263(d) provides for the Veterans Court, in reviewing findings or orders of the Board, to "order a reduction in the fee called for in the agreement if it finds that the fee is excessive or unreasonable."

In sum, an attorney with a contingent fee contract for payment of twenty percent of accrued veterans benefits awarded, discharged by the client before the case is completed, is not automatically entitled to the full twenty percent fee. He may receive only a fee that fairly and accurately reflects his contribution to and responsibility for the benefits awarded.

B. The remaining question is which entity in the Department is to determine the amount of the fee the Department should pay Mason – the Board or the Regional Office.

The Board is primarily an appellate tribunal. Its name is the "Board of Veterans' Appeals" and the number

of its members is such "as may be found necessary in order to conduct hearings and dispose of appeals properly before the Board in a timely manner." 38 U.S.C. § 7101(a). The Board's substantive jurisdiction is broad. 38 U.S.C. § 511(a) states that "[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." Section 7104(a), captioned "Jurisdiction of the Board," provides:

> All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board.

The Board thus serves as the deciding entity "on appeal to the Secretary" of a question "subject to decision by the Secretary" under § 511(a). The decision of questions relating to attorney fees for representing veterans in seeking benefits before the Department "[a]ffects the provision of benefits by the Secretary to veterans." *See Cox v. West,* 149 F.3d 1360, 1364-65 (Fed. Cir. 1998). Thus, the Board has jurisdiction over appeals involving contingent fee contracts under which the attorney is to receive up to "20 percent of the amount of any past-due benefits awarded on the basis of the claim" and the Secretary is to pay that fee to the attorney out of those benefits. *See* 38 U.S.C. § 5904(d)(1)(2)(A)(i), (ii).

As noted, there is one statutory provision that gives the Board non-appellate authority. Section 5904(c)(2) requires the filing with the Board of fee agreements for representing claimants before the Department or the Board, and provides that the Board

> may review such a fee agreement and may order a reduction in the fee called for in the agreement if the Board finds that the fee is excessive or unreasonable.

In its en banc decision in this case, the veterans court stated:

> Because we read *Cox* as holding that the Board does not have original jurisdiction to consider under section 5904(c)(2) any issues regarding entitlement to attorney fees in direct-payment cases, we hold that all issues involving entitlement or eligibility for attorney fees under direct-payment contingency-fee agreements, as contrasted with the issues of reasonableness and excessiveness, must first be addressed by the RO in accordance with the normal adjudication procedures and cannot be the subject of sua sponte or other original (on motion) BVA review. (citations omitted).

The line between (1) entitlement to and (2) reasonableness and excessiveness of attorney fees may not be as clear and bright as the Veterans Court believed. That court apparently viewed the dispute in this case as one involving "entitlement" (over which the Board lacked "original jurisdiction") and therefore an issue over which only the Regional Office had original jurisdiction. Suppose, for example, it was determined that an appropriate fee for Mason would be ten percent of the awarded accrued past benefits. Could not that conclusion also be framed in terms of reasonableness and excessiveness, i.e., any fee of more than that amount would be unreasonable and excessive? Thus, it is unclear that this case involves solely entitlement to, rather than the reasonableness of, an attorney fee.

Moreover, it also is unclear whether the only basis for the Board's jurisdiction here is § 5904(c)(2). *Cox* involved a quite different situation and did not directly present this issue.

Cox, an attorney, represented a veteran before the Department in a claim for benefits, pursuant to a twenty percent contingent fee agreement under which the Secretary was to pay the fee to the lawyer out of any past-due benefits. The veteran was awarded such benefits, but the Department paid them all to the veteran and did not withhold the twenty percent covering Cox's fee. When the Regional Office refused to pay Cox his fee, Cox sought a writ of mandamus from the Veterans Court directing the Department to make such payment, which the court denied. Cox then sought similar relief from the Board, which declined to act on the matter. Cox next again sought mandamus from the Veterans Court, this time seeking only an order directing the Board to issue a final decision on his claim, from which he could appeal to that court.

The Veterans Court denied the writ and Cox appealed to this court. We vacated the Veterans Court decision and remanded to that court to consider whether, in light of changed circumstances since its decision, it should now compel the Secretary to issue a final decision from which Cox could appeal. In so concluding, we stated that § 5904(c)(2)

> does not provide the Board with jurisdiction to review Cox's claim . . . because the reasonableness of the fee is not in dispute in this case. Cox is seeking payment by the Secretary of an undisputed fee. By its terms, section 5904(c)(2) only gives the Board limited jurisdiction to review the *reasonableness* of a fee and to *reduce* the fee.

> That subsection does not confer jurisdiction on the Board to order payment of a fee, and one therefore cannot justify issuance of a writ of mandamus based on that section.

149 F.3d at 1364. *See also Hanlin v. United States,* 214 F.3d 1319, 1321 (Fed. Cir. 2000) ("38 U.S.C. § 511(a) *permits* an attorney seeking payment of attorney fees under 38 U.S.C. § 5904(d) to pursue a claim via the VA administrative process, and 38 U.S.C. § 511(a) requires the Secretary to make a decision on such a claim.").

We then ruled, however, that the Board might have jurisdiction over Cox's claim under § 7104, because that claim required the Secretary under § 511(a) "to make a decision 'under a law that affects the provision of benefits by the Secretary to veterans.'" 149 F.3d at 1365 (quoting [38 U.S.C.] § 511(a)).

C. We need not here decide whether the Board would have jurisdiction over Mason's claim under § 5904(c)(2), since we conclude that the Veterans Court's decision that the Regional Office should decide this issue may be sustained on an alternative ground: that on the particular facts of this case, the Regional Office was the appropriate agency initially to decide Mason's attorney fee claim.

There are a number of factually-oriented issues that may have to be resolved in connection with deciding Mason's claim for attorney fees. Not all of them necessarily will be resolved but they all involve the kind of factual inquiries that the Regional Office is better qualified to make than the Board.

1. For what reasons did Scates terminate Mason's employment before the case was completed?

2. On what basis should Mason's share of the twenty percent contingent fee be calculated? Should it reflect the proportion of the total days spent on the case? Or should it be based upon the number of hours Mason spent on the case compared to the hours expended by the Veterans of Foreign Wars? May Mason obtain a fee on some other theory, such as quantum meruit? May the Department award a fee on that basis, or must Mason seek recovery from Scates in a different forum (such as a suit in state court)?

3. Is the Veterans of Foreign Wars seeking any legal fees for the services it performed for Scates?

There may be other factual issues to be decided in this case. The foregoing list is illustrative, not exhaustive. It shows that even if, contrary to the conclusion of the en banc Veterans Court, the Board would have jurisdiction here, the nature of the issues makes the Regional Office a more appropriate forum than the Board initially to decide the questions.

D. Mason contends that the Veterans Court improperly authorized his former client Scates to participate in the Regional Office proceedings to determine Mason's right to a fee. Scates, however, has a substantial, immediate and direct financial interest in the attorney fee claim, since the Department's payments to Mason will be made from the twenty percent of Scates' accrued benefits that the Department withheld for that purpose. If less than the twenty percent is paid to Mason, presumably the balance will be paid to Scates.

Another provision of Title 38 provides for the client's participation in administrative proceedings relating to attorney fees. Section 5904(c)(2) authorizes the Board, on

its own or on "the request of either party" to review a fee agreement filed with it and reduce any fees it finds to be excessive or unreasonable. If the client requests review of his fee agreement, the client could participate (to whatever extent the Board permits participation) in the Board proceedings. The Regional Office proceeding in the present case will be similar to such Board proceeding under § 5904(c)(2), although the statute does not expressly provide for that proceeding. There is no reason to believe that Congress intended to preclude the claimant from participating in the Regional Office proceeding and the Veterans Court did not err in permitting such participation.

E. Since the case is being remanded to the Regional Office, we briefly address an issue that that entity presumably will consider.

In view of Scates' termination of Mason's employment, is Mason entitled to any portion of the twenty percent contingent fee arrangement? In its panel opinion, the Veterans Court ruled that under New York law the termination extinguished Mason's right to a contingent fee. The en banc court, however, vacated the panel decision when it granted rehearing en banc.

Ordinarily state law controls the attorney-client relationship. *See Baird v. Koerner,* 279 F.2d 623 (9th Cir. 1960). Here, however, a federal statute provides for and governs the twenty percent contingent fee arrangement and the Secretary's payment of the fee to the attorney out of the proceeds of the past benefits awarded. In that situation, should not federal rather than state law govern those aspects of the relationship? *Cf. Howard v. Lyons,* 360

U.S. 593, 597 (1959) (holding that the validity of government official's claim of absolute immunity for statement allegedly defamatory under state law "must be judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress"). Of course, such federal standards may reflect and incorporate, as federal law, state law provisions governing the attorney-client relationship. *See, e.g., United States v. Brosnan,* 363 U.S. 237 (1960) (noting the desirability of "adopt[ing] as federal law state law," in part because the area of law in question was "long since settled and regulated by state law").

CONCLUSION

The judgment of the Veterans Court vacating the Board's decision is modified to provide that the matter is remanded to the Regional Office for further proceedings consistent with this opinion. As thus modified, the judgment of the Veterans Court is affirmed.

MODIFIED AND AFFIRMED.

Mitchell SCATES, Jr., Appellant,

v.

Hershel W. GOBER, Acting Secretary of Veterans Affairs, Appellee.

Kenneth B. Mason, Jr., Intervenor.

No. 97-875.

United States Court of Appeals for Veterans Claims.

Argued June 7, 2000.

Decided August 14, 2000.

Mitchell Scates, pro se.

R. Randall Campbell, with whom Robert E. Coy, Acting General Counsel; and Ron Garvin, Assistant General Counsel, all of Washington, D.C., were on the brief, for the appellee.

Kenneth M. Carpenter, of Topeka, KS, was on the brief for Kenneth B. Mason, Jr., as intervenor.

James C. McKay, of Washington, DC, was on the brief as amicus curiae for the Appellant.

Before NEBEKER, Chief Judge, and KRAMER, FARLEY, HOLDAWAY, IVERS, STEINBERG, and GREENE, Judges.

NEBEKER, Chief Judge:

This appeal involves a dispute between the appellant, veteran Mitchell Scates, and the intervenor and appellant's former attorney, Kenneth Mason, over a 20% contingent fee agreement. Mr. Scates appeals an April 30, 1997, Board of Veterans' Appeals (Board or BVA) decision which

determined that Mr. Mason was eligible for the payment of attorney fees withheld by the Secretary from past-due benefits, purportedly pursuant to 38 U.S.C. § 5904(d)(3), for legal services rendered by Mr. Mason on behalf of Mr. Scates. In October 1999, a panel of this Court reversed the Board decision; the Court held that the fee agreement had been abrogated upon the termination of the attorney-client relationship in 1994 and that no right to the 20% contingent fee survived.

The intervenor sought and was granted review by the full Court. *Scates v. West,* 13 Vet.App. 304 (2000) (en banc order), *withdrawing* 13 Vet.App. 98 (1999). The intervenor then filed a motion to dismiss this appeal because, he argued, the Board, and therefore this Court, lacked jurisdiction to decide that he was eligible to receive the withheld fee. Since it is appropriate to raise this jurisdictional issue at any time during the pendency of the appeal, we entertain it, agree that the Board lacked jurisdiction in this matter, and will vacate the Board decision, with directions. *See In the Matter of the Fee Agreement of Wick,* 40 F.3d 367, 370 (Fed.Cir.1994).

I.

A review of the record on appeal reveals that in April 1996, a VA regional office (RO) "processed an award in the amount [of $154,119.00]" on behalf of the appellant. Record (R.) at 98. Pursuant to the contingent fee agreement on file, the RO "withheld $30,823.00 from [the appellant's] retroactive benefits *pending a decision by the Board of Veterans Appeals on the issue of your attorney's entitlement* to direct payment out of the past-due amount."

Id. (emphasis added). The RO further informed the appellant that "the records in this case [were] being transferred to the Board of Veterans Appeals *for a determination of eligibility for payment of attorney fees* from any past-due benefits." R. at 99 (emphasis added). In April 1997, the Board determined that the intervenor was "*eligible for payment of attorney fees* from past-due benefits." R. at 2 (emphasis added). The appellant had discharged him nearly two years before the RO granted the long-disputed benefits with full retroactivity, and the fee agreement is silent on payment of fees upon termination of the attorney-client relationship. The gravamen of the intervenor's argument is twofold: First, the Secretary is required by statute to decide whether to award a withheld contingency fee prior to any review by the Board, and, second, the Board, as part of its original jurisdiction, is authorized to decide only the reasonableness of the fee, not eligibility to receive it.

Title 38 of the United States Code generally contemplates a progression of claims adjudication from the initial decision at the agency of original jurisdiction, usually an RO, to review by the Board acting as a quasi-appellate body. *See* 38 U.S.C. §§ 511(a), 7104(a); 38 C.F.R. §§ 19.9, 20.1104 (1999). Specifically, section 511(a) provides in pertinent part:

> The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans.

38 U.S.C. § 511(a). In turn, the Board's general jurisdiction is limited to the review of "[a]ll questions in a matter which under section 511(a) of [title 38, U.S. Code,] is

subject to a decision by the Secretary." 38 U.S.C. § 7104. As a departure from this normal claim adjudication process, the Board is specifically provided with original jurisdiction as to fee agreements, to "review" sua sponte or at the request of either party a fee agreement filed with the Board, and it "may order a reduction in the fee called for in the agreement if the Board finds that the fee is excessive or unreasonable." 38 U.S.C. § 5904(c)(2).

II.

In *Cox v. West,* 149 F.3d 1360, 1365 (Fed.Cir.1998), the United States Court of Appeals for the Federal Circuit (Federal Circuit) considered an attorney's claim for entitlement to a fee withheld under section 5904(d) (i.e., a direct-payment case). Implicitly acknowledging the adjudication progression at the agency level in the context of a claim for direct payment of a contingency fee by the Secretary, the Federal Circuit concluded that the attorney's claim "requires the Secretary to make a decision 'under a law that affects the provision of benefits by the Secretary to veterans.'" *Id.* (quoting 38 U.S.C. § 511(a)). The Federal Circuit also noted that section 5904(c)(2) provided the Board only the authority to review for "*reasonableness.*" *Id.* at 1364. The authority to review fee agreements for "eligibility" does not appear in the statute (*cf.* Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (5th ed.1992) (discussing the maxim "*expressio unius est exclusion alterius*")); however, under our caselaw, it appears that eligibility to charge a fee in non-direct-payment cases may be reviewed by the BVA in the first instance as a component of its section 5904(c)(2) authority to review for reasonableness (*see In re Fee Agreement of Stanley,* 10 Vet.App. 104 (1997)).

In the instant appeal, which involves a direct-payment contingency-fee agreement, the agency of original jurisdiction never made a decision concerning the award of the withheld attorney fees to the intervenor under section 511(a). Rather, the RO forwarded the matter to the Board for a "determination of eligibility." R. at 99. The Board, which has the limited original jurisdiction to review fee agreements for reasonableness or excessiveness, concluded that the intervenor was "*eligible for payment of attorney fees* from past-due benefits," and, quoting from VA Gen. Coun. Prec. 22-95 (Sept. 28, 1995), the Board concluded that "VA may directly pay [the] attorney fees." R. at 2, 9. Because we read *Cox* as holding that the Board does not have original jurisdiction to consider under section 5904(c)(2) any issues regarding entitlement to attorney fees in direct-payment cases, we hold that all issues involving entitlement or eligibility for attorney fees under direct-payment contingency-fee agreements, as contrasted with the issues of reasonableness and excessiveness, must first be addressed by the RO in accordance with the normal adjudication procedures and cannot be the subject of sua sponte or other original (on motion) BVA review. *See Cox, supra; cf. In re Fee Agreement of Stanley,* 10 Vet.App. 104, 108 (1997) (in context of non-direct-payment agreement Court affirmed BVA's decision that attorney was ineligible for fees from client because there was no final BVA decision).

The matter of attorney fees remains pending before the Secretary by virtue of the fee agreement filed in this case. After notice to the appellant and intervenor, and an opportunity to be heard, that claim should be decided by the RO. The aggrieved party may then file a Notice of Disagreement and pursue an appeal to the Board and this

Court if so desired. *See Cox,* 149 F.3d at 1362; *cf. Hanlin v. United States,* 214 F.3d. 1319, 1320-21 (Fed.Cir.2000) (alternatively, under 28 U.S.C. § 1491(a)(1), Court of Federal Claims has jurisdiction to consider "a non-frivolous claim alleging the existence of a contract" by "an attorney seeking relief for non-payment of fees by the VA."). Our decision today does not decide the question of the effect of the termination of the attorney-client relationship between Mr. Mason and Mr. Scates and leaves that question for decision at the initial administrative level. Neither does the Court express any view as to the reasonableness or excessiveness of the fee called for in this agreement since the facts surrounding such issues must be developed in the adjudication of the pending claim. The Board's decision is VACATED for want of original jurisdiction to decide eligibility for direct payment of a withheld contingency fee under § 5904(d), and the matter is REMANDED to the Board with directions to dismiss the matter of direct-payment fee eligibility as referred to the Board by the RO. *See In the Matter of the Fee Agreement of Wick, supra.*

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 97-875

MITCHELL SCATES, JR., APPELLANT,

v.

TOGO D. WEST, JR., SECRETARY OF VETERANS AFFAIRS, APPELLEE.

KENNETH B. MASON, JR., INTERVENOR

On Appeal from the Board of Veterans' Appeals

(Argued May 24, 1999 Decided Oct. 13, 1999)

Mitchell Scates, pro se

R. Randall Campbell, with whom *Robert E. Coy*, Acting General Counsel; and *Ron Garvin*, Assistant General Counsel, were on the brief, for the appellee.

Kenneth M. Carpenter was on the brief for Kenneth B. Mason, Jr., as intervenor.

James C. McKay was on the brief as amicus curiae for the appellant.

Before NEBEKER, *Chief Judge*, and FARLEY and HOLDAWAY, *Judges*.

NEBEKER, *Chief Judge*, filed the opinion of the Court. HOLDAWAY, *Judge*, filed a dissenting opinion.

NEBEKER, *Chief Judge*: This is a dispute between the appellant, Mitchell Scates, and his former attorney, Kenneth Mason, over the dispersal of funds from the award of back benefits representing attorney fees, withheld by the Secretary purportedly pursuant to 38 U.S.C.

§ 5904(d)(3) and a fee agreement. The appellant appeals the April 30, 1997, Board of Veterans' Appeals (BVA or Board) decision which determined that Mr. Mason was eligible for the payment of attorney fees from past-due benefits for legal services rendered on behalf of Mr. Scates. Upon consideration of the arguments of counsel, the pleadings of the parties, and a review of the record on appeal before this Court, the Court will hold that the Board erred as a matter of law when it determined that the fee agreement on record between Mr. Scates and Mr. Mason was still in force after the termination of the attorney-client relationship, and will hold that, accordingly, the Secretary had no authority to award attorney fees to Mr. Mason and withhold monies belonging to Mr. Scates because no fee agreement existed as a predicate for such action.

I. FACTS

The facts in this matter are undisputed. On January 14, 1991, Mitchell Scates, a veteran, and Kenneth Mason, a New York attorney, entered into a Fee Retainer Contract [hereinafter "fee agreement"] which was drafted on Mr. Mason's letterhead. Record (R.) at 44-46. The fee agreement gave recitals as to the payment of a fixed fee, a contingent fee, and costs and expenses. Additionally, the document addressed the effect that any future discharge or withdrawal of Mr. Mason would have on monies due under the fee agreement. *Id.* Specifically, a paragraph headed "discharge and withdrawal" stated:

> You may discharge me at any time. I may withdraw with your consent or for good cause. . . . If I withdraw before completing my duties under this Contract, you may be entitled to a refund of some

> or all of the Fixed Fee, if any, depending on the facts and circumstances.

Id. The fee agreement was renewed on April 27, 1993, by supplemental letter. The renewed document was amended, inter alia, to include reference to an award of contingent fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 and an admonition to the "DVA to withhold twenty percent (20%) of past due benefits payable . . . and to pay such amount to" Mr. Mason. R. at 62-63. In addition, the amendments provided an express recital of the remedies available to Mr. Mason, under New York law, in the event that Mr. Scates failed to comply with the amended document. R. at 62-63. Specifically, the amendments provided:

> I [Mr. Scates] hereby give you a lien on my claim and on any sum recovered, whether by judgement, settlement, or administrative action, to the extent of the amount due under this Agreement for your fees and expenses. It is further agreed that you [Mr. Mason] shall have all general, possessory or retaining liens and all special or charging liens known to the common law or available *under the laws of the State of New York*.

Id. (emphasis added). In May 1992, during Mr. Mason's representation of Mr. Scates, this Court vacated the BVA's decision against Mr. Scates and "grant[ed] the Secretary of Veterans Affairs . . . motion for remand." R. at 52. The BVA subsequently remanded the matter to the regional office (RO). The record before the Court is unclear as to the efforts of Mr. Mason on behalf of Mr. Scates during his representation; however, the docket from the proceedings below shows that Mr. Mason filed a statement of the issues, a brief, and several procedural motions. *See* Amicus

Curiae Brief (Br.) at 10. Additionally, the record of the instant proceedings shows that Mr. Mason did correspond with the BVA on Mr. Scates' behalf while representing him, but the extent of this correspondence is not clear from the record. R. at 56, 68-69; *see also* Amicus Curiae Br. at 10.

On June 27, 1994, Mr. Scates executed a power of attorney for the Veterans of Foreign Wars (VFW) that stated, "the organization named herein will be recognized as the sole agent for presentation of [Mr. Scates'] claim." R. at 73. Shortly after receiving notice of the termination of his representation of Mr. Scates (R. at 82-83), Mr. Mason wrote a letter to Mr. Scates stating, "[Y]ou have terminated our relationship and, therefore, I am closing my file." R. at 85. The letter was dated August 1, 1994. *Id.* The VA acknowledged the termination of the attorney-client relationship. R. at 80, 82-83.

On March 3, 1996, almost two years after the dissolution of the attorney-client relationship between Mr. Mason, and Mr. Scates, for reasons that are unclear from the record before the Court, the RO granted service connection for paranoid-type schizophrenia, and assigned a 100% disability rating from June 1988. R. at 94-96. The RO awarded Mr. Scates $154,119 in retroactive benefits and withheld 20%, or $30,823, pursuant to a determination of Mr. Mason's "entitlement to direct payment out of the past-due amount," based on the January 1991 fee agreement. R. at 98-103. On April 30, 1997, the BVA determined that the "fee agreement satisfied the governing criteria for payment by VA from past-due benefits[,] . . . that the agreement had been properly executed and filed, and that the contingent-fee provisions had been fulfilled." Secretary's Br. at 3. Although the BVA acknowledged that Mr.

Scates had revoked the appointment of Mr. Mason, citing VA General Counsel Precedent Opinion 22-95 (Sept. 22, 1995) [hereinafter G.C. Prec. 22-951, the BVA concluded "that [Mr. Scates'] revocation of [Mr. Mason's] authority to act on his behalf does not bar payment of attorney fees to [Mr. Mason] that are otherwise due." R. at 9. This appeal followed.

II. ANALYSIS

A. Jurisdiction

As a preliminary matter, the Court must determine whether it has jurisdiction to entertain this appeal. This Court's appellate jurisdiction derives exclusively from statutory grants of authority provided by Congress and may not be extended beyond that permitted by law. *See Skinner v. Derwinski*, 1 Vet.App. 2, 3 (1990); *see also Harris v. West*, 11 Vet.App. 456, 459 (1998). The parties assert that this Court has jurisdiction under 38 U.S.C. § 7263(d). *See* Secretary's Br. at 2; Intervenor's Supplemental (Suppl.) Br. at 14. Indeed, the Court has been granted specific, but limited, jurisdiction under that statute to review the reasonableness of fee agreements filed with the Court and those reviewed by the Board pursuant to 38 U.S.C. § 5904(c)(2). "An order of the Court under [section 7263(d)] is final and may not be reviewed in any other court." 38 U.S.C. § 7263(d). However, the critical issue presented by this matter at this stage is not the reasonableness of a fee agreement but the threshold question whether, in view of the termination of the attorney-client relationship, there is a fee agreement. *See Huckabay v. Moore*, 142 F.3d 233, 237 (5th Cir. 1998) (citations omitted) (federal courts of appeals "may liberally construe briefs to determine what issues are presented);

see also United States Bank of Oregon v. Independent Insurance Agents of America, 508 U.S. 439, 477 (1993); *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *Lear v. Adkins*, 395 U.S. 553, 662 n.10 (1969) (appellate court may decide case based on issue not identified or briefed by parties). Neither section 7263(d) nor section 5904(c)(2) affords the Court jurisdiction to address that issue. Therefore, we conclude that the parties' reliance on 38 U.S.C. §§ 7263(d), 5904(c)(2) is misplaced.

Amicus curiae, on the other hand, maintains that the Court has jurisdiction over the appeal by virtue of its general grant of jurisdiction under 38 U.S.C. § 7252. *See* Amicus Curiae Br. at 4-5. We agree. Pursuant to 38 U.S.C. § 511(a), the "Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." The Board's appellate jurisdiction is defined in 38 U.S.C. § 7104(a): "All questions in a matter which under section 511(a) of this title is subject to a decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board." Finally, section 7252(a) provides that this Court has exclusive jurisdiction over decisions by the Board, and the scope of this review includes that authority to "decide all relevant questions of law." *See* 38 U.S.C. § 7261(a)(1). Indeed, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has traced this jurisdictional chain of authority in the specific context of fee

agreements: "[T]here is more to [title 38] than section 5904. . . . [S]ection 7104 of title 38 confers jurisdiction on the Board over questions arising under section 511(a), and a claimant may in turn appeal an adverse Board ruling to [this Court] under 38 U.S.C. § 7252(a)." *Cox v. West*, 149 F.3d 1360, 1364 (Fed. Cir. 1998).

There is a final Board decision over which this Court can and must exercise jurisdiction. In April 1997, the Board made a decision awarding attorney fees to Mr. Mason. R. at 1-11. The decision to award Mr. Mason attorney fees deprives Mr. Scates of monies otherwise due him. Therefore, Mr. Scates has been "adversely affected" by the Secretary's decision and has standing to contest that decision. *Corchado v. Derwinski*, 1 Vet.App. 160, 162-63 (1991); *see also Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79, 81 (2nd Cir. 1991) (standing doctrine requires that party have [sic] suffered injury beyond a citizen's general concern that government may not be following law). Mr. Scates filed a timely Notice of Appeal (NOA). *See* 38 U.S.C. § 7266(a). Thus, the record on appeal reflects that two of the requisite jurisdictional elements, a final Board decision and a timely NOA, have been satisfied and that the appellant has standing to seek judicial review.

Turning to the remaining jurisdictional prerequisite, the Court has jurisdiction to review only those final BVA decisions which stem from a Notice of Disagreement (NOD), which was filed on or after November 18, 1988, as to an underlying decision of an RO or other agency of original jurisdiction (AOJ). *See* Veterans' Judicial Review Act, Pub. L. No. 100-687 § 402, 102 Stat. 4105, 4122 (1988) (found at 38 U.S.C. § 7251 note) [hereinafter VJRA § 402]; 38 U.S.C. § 7105; *Barrera v. Gober*, 122 F.3d 1030, 1031

(Fed. Cir. 1997); *Grantham v. Brown*, 114 F.3d 1156, 1157 (Fed. Cir. 1997), *rev'g* 8 Vet.App. 228 (1995). This appeal began with an adverse RO decision rendered against Mr. Scates' claim for service connection for PTSD in January 1989. R. at 56. An NOD was received by the Board from Mr. Scates in April 1989. R. at 56. In *Barrera, supra*, the Federal Circuit recently determined that:

> [A] veteran's overall claim is comprised of separate issues, and . . . the Court of Veterans Appeals has jurisdiction to consider one or more of those issues, provided an NOD has been filed after the effective date of the Veterans Judicial Review Act with regard to the particular issue. Thus, our precedent recognizes that multiple NODS may be filed by a veteran concerning the claim for benefits. The NOD which must serve to confer jurisdiction on the Court of Veterans Appeals is the first one filed with respect to a given issue, *i.e.*, the NOD which initiates judicial review of the issue on which the veteran has received an unfavorable administrative determination.

Barrera, 122 F.3d at 1032. Unlike the situation in *Barrera*, which was concerned with the effect of pre-VJRA NODS on the jurisdiction of the Court over all of the issues in a veteran's claim, the matter of attorney fees in the instant case arises out of the "appeal process stemming from the first NOD." *Grantham*, 114 F.3d at 1158. That *Barrera* permits multiple NODS for the various issues involved in a claim does not mean that there *must* be multiple NODS. It follows, therefore, that the April 1989 NOD constitutes the requisite jurisdiction-conferring NOD. Alternatively, the procedural history of this case demonstrates that, from the moment Mr. Scates initiated his appeal of the original

RO decision by filing a post-1988 NOD, his claim has remained in appellate status. At the time of the Board's remand to the RO, Mr. Scates was informed that "[n]o action [was] required of [him]." R. at 59-60. On remand from the BVA, the RO granted the appellant's claim but withheld $30,832.00 in past-due benefits from the veteran and left the matter of "determin[ing] eligibility for payment of attorney fees from any past-due benefits" up to the Board. R. at 99. In fact, the RO specifically informed Mr. Scates that "a decision by the Board of Veterans Appeals" was pending regarding the issue of Mr. Mason's entitlement to attorney fees. R. at 98. Accordingly, while there is no NOD of record specifically addressing the award of attorney fees, the matter of attorney fees was inchoate to the award of past-due benefits and never would have emerged but for that award. Thus, the NOD which initially conferred jurisdiction as to the merits of Mr. Scates' claim, to borrow a phrase from the criminal law, had not gone stale. *See, e.g., U.S. v. Watson*, 423 U.S. 411, 432 (1976) (Powell, J. concurring).

"Thus, the three basic prerequisites for the Court to have jurisdiction over an appeal[,] . . . a final BVA decision, a post-November 17, 1998, NOD as to the VARO decision leading to that BVA decision, and a timely NOA[,]" are satisfied in this case and the Court has jurisdiction to review the Board's decision granting attorney fees from past-due benefits. *Smith v. Brown*, 10 Vet-App. 330, 332 (1997).

B. Merits

1.

The responsibility for regulating lawyers and the attorney-client relationship historically has been reserved to the sovereign states. *See Leis v. Flynt*, 439 U.S. 438, 442 (1979) (per curiam) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions."). Similarly, "the relationship of client and attorney is created and controlled by the law[s] of the various states; and that . . . creation and control is recognized, followed, and approved by the federal courts." *Baird v. Koerner*, 279 F. 2d 623, 632 (9th Cir. 1960); *see also Novinger v. E.I. DuPont de Nemours & Co.*, 809 F.2d 212, 217 (3rd Cir. 1987), *cert. denied sub nom. Novinger v. Kramer*, 481 U.S. 1069 (1987) (attorney fee agreements are matters primarily of state contract law); *United States v. Whitley*, 1978 WL 1200, *10 (E.D.N.C. 1978) (state law "governs the basic attorney-client relationship generally."); *but see Heathman v. U.S. District Court*, 503 F.2d 1032, 1034 (9th Cir. 1974) (application of federal common law or state law to attorney-client relationship depends on nature of action). If a contingent-fee contract exists independent of federal law, then it must be a creature of state law. *See, e.g., Sentry Corp. v. Harris*, 802 F.2d 229, 232, 233 (7th Cir. 1986) (where federal law is silent there is presumption in favor of state law under Rules of Decision Act 28 U.S.C. § 1652 (1982)). As a creature of state law, the terms of the contract, and, even its very existence, are governed by state law and the common law of contracts.

The attorney-client relationship is one of fiduciary and beneficiary. Lawrence A. Cunningham and Arthur J.

Jacobson, CORBIN ON CONTRACTS §1095 at 223 (1998 Pocket Part). In order to protect that fiduciary relationship, most jurisdictions now hold that a client is entitled, as a right of contract, to terminate the attorney-client relationship at any time, for any reason, however arbitrary. *Id.* Thus, when a client discharges a lawyer, the client is exercising a contract right implied in law. *Id.* This principle is reflected in the traditional state law rule that when a client terminates an attorney relationship, the contingent-fee contract ceases to exist, the contingency is no longer operative, and the discharged attorney must pursue compensation for any services rendered before the discharge on a quantum meruit basis. *See, e.g., Albert Brooks Friedman, Ltd. v. Malevitis, et. al.*, 710 N.E.2d 843, 847 (111. 1999); *see also Agresta v. Sambor*, ___ F.Supp. ___, 1994 WL 70347, *2 (Pa. 1994) (fee contract abrogated on termination of attorney-client relationship, but attorney not deprived of right to quantum meruit recovery). *Cf. Broughten v. Voss*, 634 F.2d 880, 882 (5th Cir. 1981) (citations omitted) ("The law seems well settled that a federal district court may condition the substitution of attorneys in litigation pending before it upon the client's either paying the attorney or posting security for the attorney's reasonable fees and disbursements, as these may be determined."). "'[T]ermination' . . . of a contract means to abrogate so much of it as remains unperformed, or doing away with an existing agreement upon the terms and with the consequences mentioned in the writing." 17A C.J.S. *Contracts* § 385(2) (1980); *see also Blodgett v. Merritt Annex Oil Co.*, 65 P.2d 123, 125 (Cal. 1939). The mortality of contracts is demonstrated by the fact that most state courts "are prone to hold against the theory that a contract confers a perpetuity of right or imposes a perpetuity of obligation." *Preferred Physicians Mutual Management*

Group, Inc. v. Preferred Physicians Mutual Risk Retention Group, Inc., 961 S.W.2d 100, 103-104 (Mo. 1998).

The record in the case before the Court reflects that the appellant discharged Mr. Mason on June 27, 1994, when Mr. Scates executed a power of attorney in favor of the VFW. *Cf.* 38 C.F.R. § 20.607 ("An appropriate designation of a new representative will automatically revoke any prior designation of representation."). Mr. Mason's August 1, 1994, letter to Mr. Scates confirmed the termination of the attorney-client relationship. R. at 73, 85, 98-103. *See Wozniak v. Tonidandel*, 699 N.E.2d 555, 557 (Ohio 1997) (attorney-client relationship is consensual in nature and action of either party dissolving essential mutual confidence may signal termination of relationship). *Cf. Gansert v. Corder*, ___ P.2d ___, 1999 WL 301372, *1 (Kan. 1999) (recognizing de facto termination of attorney-client relationship). The record also reflects two other matters of significance apparent from the original fee agreement and its April 1993 amendments. First, there is nothing in the original agreement with respect to the creation or continuation of any definite rights or obligations following the exercise of Mr. Scates' unlimited right to terminate the relationship or Mr. Mason's right to terminate the relationship "with . . . consent or for good cause." R. at 45. Second, the fee agreement, as amended in April 1993, expressly provides that New York law will control any remedies available to Mr. Mason. R. at 63. Accordingly, this Court will briefly examine the law of the sovereign state of New York to see whether the contract was terminated.

New York law recognizes that the discharge of an attorney by a client terminates the existence of a contingent fee agreement. *See Wojcik v. Miller Bakeries Corp.*,

142 N. E.2d 409, 411 (N.Y. 1957); *see also Tillman v. Komar*, 181 N.E. 75 (N.Y. 1932) ("The client is entitled to cancel his [fee agreement] but such an agreement cannot be partially abrogated. Either it wholly stands or totally falls. After [termination], its terms no longer serve to establish the sole standard for the attorney's compensation."). Furthermore, under New York law, it is well established that "[a] client may always discharge his attorney, with or without cause, and in the absence of an agreement providing otherwise an attorney discharged without cause is entitled to be compensated in quantum meruit." *Jacobson v. Sassower*, 489 N.E.2d 1283, 1284 (N.Y. 1985). In fact, upon the termination of a fee agreement, "a cause of action for the reasonable value of his services immediately accrues to the attorney." *Zimmerman v. Kallimopoulou*, 290 N.Y. S.2d 270, 273 (1967). Thus, it appears that New York adheres to the general principle that when a client terminates an attorney relationship, the contingent-fee contract ceases to exist, the contingency is no longer operative, and the discharged attorney must pursue compensation for any services rendered before the discharge on a quantum meruit basis.

The Court concludes that, under the general state law rule, when the attorney-client relationship was terminated, the contingent-fee contract between the claimant and the representative ceased to exist. New York law is not to the contrary. In purporting to enforce that agreement by awarding attorney fees to Mr. Mason, the Board erred as a matter of law.

2.

The Board in its decision and the Secretary in his brief ignores the pivotal and outcome-determinative question of the effect of the termination of the attorney-client relationship on the fee agreement. They focus instead on the agreement's compliance with the statutory and regulatory prerequisites of section 5904 as justification for the fee award to Mr. Mason. Secretary's Br. at 4-5. These prerequisites specify, inter alia, that the representative of a claimant must file a copy of any fee agreement between them with the Secretary, that the award of a fee cannot exceed 20% of the total amount of past-due benefits awarded on the basis of a claim, that the fee is one to be paid directly to the attorney by VA, and that the fee is contingent on whether the matter is resolved in a manner favorable to the claimant. *See* 38 U.S.C. §§ 5904(c)(2)-(d)(3). It may be taken as given that the fee agreement between Mr. Mason and Mr. Scates initially satisfied these statutory prerequisites but they simply have no bearing upon the question of the continued existence of a fee agreement upon the subsequent termination of the attorney-client relationship.

The Secretary also purports to rely upon G. C. Prec. 22-95 for the proposition that so long as the statutory and regulatory prerequisites for the direct payment of attorney fees out of past-due benefits are otherwise met, those fees may be paid to an attorney who no longer represents a claimant. *See* Secretary's Br. at 4. The Court notes that, as a matter of law, while the Secretary is bound by precedential opinions issued by the VA General Counsel, this Court is not. *See Sabonis v. Brown*, 6 Vet.App. 426 (1994) (determining this Court is not bound by precedential opinions issued by VA General Counsel). However, after reviewing

G.C. Prec. 22-95 in its entirety, this Court holds that the Secretary's reliance on G. C. 22-95, for the absolute proposition that fees may be paid to an attorney who no longer represents a client, was misplaced. The Secretary reads much more into the opinion than is there.

The Secretary relies solely on Comment 8 of G.C. Prec. 22-95. To the extent that Comment 8 authorizes payment of fees to an attorney who no longer represents a client provided the statutory and regulatory prerequisites are met, the Secretary's reliance might be justified. However, by its terms it does not address the situation presented here. On the other hand, Comment 9 of G.C. Prec. 22-95 advises that:

> A claimant is free to change attorneys, or switch from a service organization to an attorney representative, while his or her case is [in appellate status]. We can only advise that in such cases, VA's obligation to pay attorney fees would depend on the terms of the fee agreement and whether the provisions of the applicable fee payment statutes and regulations are met.

Furthermore, G.C. Prec. 22-95 goes on to hold that:

> VA's obligation to pay attorney fees when the attorney fee arrangement was only in place for part of the time the case was [in appellate status] is dependent upon the terms of the fee agreement and whether the statutory and regulatory prerequisites for direct payment of attorney fees have been met.

Thus, G.C. Prec. 22-95 contemplates more than a knee-jerk award of attorney fees under a fee agreement which facially satisfied the statutory and regulatory prerequisites and just happens to be lurking in the claims file. In

fact, a footnote to G.C. Prec. 22-95 Comment 9 directs that "[i]n complex cases . . . [the VA general counsel's] assistance in interpreting the applicable fee agreements or filing motions with [this Court] requesting clarification of . . . VA's obligation to pay attorney fees" may be appropriate. When read in its entirety, G.C. Prec. 22-95 actually limits the absolute position now taken by the Secretary particularly where, as here, the "terms of the fee agreement" contain no provisions for the payment of fees following termination.

Furthermore, while it is true that under section 5904 certain statutory and regulatory prerequisites must be satisfied before attorney fees will be awarded, a close reading of section 5904 discloses that it contemplates the continued existence of a contingent-fee contract between an attorney and a claimant. Indeed, section 5904(c)(2) compels the party acting as the claimant's representative to "file a copy of any fee agreement between them with the Board." *See AVR, Inc. v. Cemstone Products Co.*, ___ F.Supp. ___ 1993 WL 104933 *4 (D. Minn. 1993) (under contract theory, existence of attorney-client relationship may be shown, in part, by fee agreement); *In re Finley*, 488 S.E.2d 74, 75 (Ga. 1997) (execution of fee agreement by client some evidence of attorney-client relationship); *Larochelle v. Hodsdon*, 690 A.2d 986,989 (Me. 1997) (existence of fee agreement evidence of attorney-client relationship); *see also Bd. of Overseers v. Dineen*, 500 A.2d 262, 264-265 (Me. 1985) ("an attorney client relationship does not require the payment of a fee or formal retainer but may be implied from the conduct of the parties."); *Cook v. Brown*, 6 Vet.App. 226, 231-232 (1994) (court will not award "attorney" fees to non-attorney). Although the Secretary has authority vis-a-vis the fee agreement, e.g.,

section 5904(c)(2) authorizes the Secretary to review the fee agreement for reasonableness, the filing of a fee agreement does not make the Secretary a party to the contingent-fee contract. Section 5904 does not intrude on the substance of contingent-fee contract, and this Court is not inclined to read into that statute any additional terms or limitations on the contract that are not specifically provided. *See* Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 61.02 (5th ed. 1992) (liberal reading of statute should be avoided where such reading would result in derogation of freedom of contract).

Based on the preceding analysis, this Court determines that the contingent-fee contract exists independent of title 38 or any other federal law; there is no provision in section 5904 which directs any other conclusion. The fact that Mr. Mason satisfied a ministerial prerequisite by filing a fee agreement neither preserves to him any rights which would have otherwise accrued under section 5904 had the attorney-client relationship survived, nor does it grant the Secretary authority to enforce a contingent-fee contract which no longer exists. In sum, 38 U.S.C. § 5904 does not and cannot justify the Board's decision to award Mr. Mason attorney fees from the portion of past-due benefits withheld from the appellant and the Board, in deciding otherwise, erred as a matter of law.

III. CONCLUSION

The Court expresses its profound gratitude to James C. McKay, Esq., the amicus curiae who submitted briefs and presented oral argument in this case. His contributions have been of great value to the Court in this and other matters.

It bears repeating that state law governs the attorney-client relationship and, in this instant case, any compensation due Mr. Mason must be pursued elsewhere. Upon consideration of the arguments of counsel, pleadings of the parties, and a review of the record on appeal before this Court, the Court holds that the Secretary had no authority to award attorney fees to Mr. Mason or to withhold monies belonging to Mr. Scates because no fee agreement existed as a predicate for such action, and, therefore, the April 30, 1997, BVA decision is REVERSED and the matter is REMANDED with direction that the Secretary disburse all monies currently withheld from the award of past-due benefits to Mr. Scates. *See* 38 U.S.C. § 7252(a). State law governs the attorney-client relationship and any compensation to which Mr. Mason might be entitled for the professional services he rendered to the appellant, perhaps under a quantum meruit theory, must be pursued elsewhere.

HOLDAWAY, *Judge*, dissenting: I do not agree with the majority's decision that under 38 U.S.C. § 5904(c)(2), the BVA lacked original jurisdiction to review the fee agreement in this matter. Section 5904(c)(2) states the following:

> A person who, acting as agent or attorney . . . , represents a person before the [VA] or the [BVA] after the Board first makes a final decision in the case shall file a copy of any fee agreement between them with the Board. . . . The Board, upon its own motion or the request of either party, *may review such a fee agreement* and may order a reduction in the fee called for in the agreement if the Board finds that the fee is excessive or unreasonable. A finding or order of the Board under the preceding sentence may be reviewed by the

> United States Court of Appeals for Veterans Claims under section 7263(d) of this title.

(Emphasis added.) Section 5904(c)(2) provides the Board with clear authority to review the validity of an attorney fee agreement that was filed with the Board. *See In re Fee Agreement of Stanley*, 10 Vet.App. 104 (1997) (affirming the Board's decision, made sua sponte pursuant to section 5904(c), that the attorney was not *eligible* under the fee agreement for direct payment of attorney fees from the Secretary); *see also* 38 C.F.R. § 20.609 (1998). Under the plain language of the statute, the Board clearly has the authority to review the terms of the fee agreement that was lodged with it, determine an attorney's eligibility to charge a fee, and reduce the amount of the fee if it was excessive or unreasonable. The laws administered by VA control whether an attorney may charge a fee for services before VA or the BVA, and when an attorney's authority to represent a claimant is terminated. *See* 38 U.S.C. § 5904(c)(1) (stating that attorney fees for services before VA or the BVA may not be charged until after the date the BVA first makes a final decision in the case); 38 C.F.R. § 20.603 (1998) ("Representation by attorneys-at-law."); 38 C.F.R. § 20.607 (1998) (Revocation of representative's authority to act."); 38 C.F.R. § 20.609 ("Payment of representative's fees in proceedings before the [VA] field personnel and before the [BVA]."); 38 C.F.R. § 20.611 (1998) ("Continuation of representation following death of a claimant or appellant."). No statutory or regulatory provision prevents the Board from reviewing a fee agreement under section 5904(c) even after the attorney's authority to represent the claimant before VA or the Board has been revoked by the claimant.

The majority opinion cites to two provisions of the fee agreement in this case that they find controlling. First, the fee agreement states that the appellant may discharge the attorney at any time. However, how and when a claimant can discharge an attorney providing representation before VA or the Board is a question controlled by laws administered by the Secretary. Subject to 38 C.F.R. § 20.1304 (1998), a claimant can revoke an attorney's power to represent him or her at any time. *See* 38 C.F.R. § 20.607. However, written notice of a revocation must be given to VA or the Board. *See id.* Also, pursuant to section 20.1304, an appellant before the Board has ninety days to notify the Board that he or she would like to change representatives. Once the ninety-day period has expired, the appellant may change representatives only with consent of the Board after showing good cause for not filing the request before the expiration of the ninety-day period. *See id.* Therefore, an appellant cannot actually discharge his or her representative at any time. The VA regulations are controlling in this matter, and their effect on the attorney fee agreement is a question reviewable by the Board. Second, the majority has stated that under the express terms of the fee agreement, the rights of the parties are controlled by the laws of the State of New York. However, the provision referred to by the majority relates only to liens under state law to secure the attorney's right to collect his fees. Clearly any lien created under state law and incorporated into the fee agreement could not be enforced by the Board. This Court has repeatedly stated that a provision in a fee agreement that creates a lien against veterans' benefits is unenforceable. *See Vargas-Gonzalez v. West*, 12 Vet.App. 63, 64 (1998). Therefore, the provision in the fee agreement relating to liens and state law is invalid. As a result,

no valid provision of the fee agreement is expressly controlled by state law.

To the contrary, the fee agreement is a contingency fee agreement established under section 5904(d). The fee agreement is therefore controlled by the laws administered by the Secretary, and its appropriate review and interpretation is pursuant to section 5904(c). In fact, under the majority's reasoning, because the claimant can terminate the attorney-client relationship at any time, even after substantial representation on behalf of the claimant, the claimant can effectively avoid application of the provisions under 38 U.S.C. § 5904(d) that permit direct payment by the Secretary to the attorney of 20% of past-due benefits if the fee agreement meets certain requirements, as the fee agreement in this case apparently did. To avoid the Secretary's withholding of 20% of past-due benefits to pay attorney fees, a savvy, judgment-proof claimant might elect to void the agreement by simply discharging his attorney after substantial services have been rendered.

Because the Board has original jurisdiction in this matter, this Court also possesses jurisdiction to review the fee agreement pursuant to 38 U.S.C. § 7263(d). This Court has the authority to "order a reduction in the fee called for in the agreement if it finds that the fee is excessive or unreasonable." 38 U.S.C. § 7263(d). The Board or this Court can review whether the fee called for under the fee agreement is reasonable or excessive based on the services that had been provided when the attorney-client relationship ended. Quantum-meruit type principles would fit easily into either the Board's or this Court's authority to review for reasonableness or excessiveness. In this matter, the attorney helped secure a remand from this Court

which in effect preserved the favorable effective date ultimately awarded to the appellant by the Secretary.

For the above reasons, I dissent from the majority's holding that the Board lacked original jurisdiction in this matter to review the fee agreement even though the attorney-client relationship had been terminated prior to an award of VA benefits. I believe the Board had authority to review the continuing validity of the fee agreement under VA law *and* the reasonableness of the fees called for by the agreement's terms. Because the jurisdiction of the Board was original, I do not express any agreement or disagreement regarding the majority's analysis of the NOD issue.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-7033

MITCHELL SCATES, JR.,

Claimant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee,

v.

KENNETH B. MASON, JR.,

Intervenor-Appellant.

ORDER

(Filed June 5, 2002)

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response have been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 11, 2002.

FOR THE COURT,

/s/ Jan Horbaly amt
Jan Horbaly
Clerk

Dated: June 5, 2002

cc: Kenneth M. Carpenter
John S. Groat

MASON V DVA, 01-7033
(CVA-97-875)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

01-7033

UNITED STATES COURT OF APPEALS
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APPEAL FROM UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS IN 97-0875
JUDGE FRANK Q. NEBEKER

APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* AND ADDENDUM

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April 19, 2002

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 28(a)(1) and 47.4, counsel for Intervenor-Appellant Kenneth B. Mason, Jr. certifies the following:

1. The full name of every party or amicus represented by me is:

   Kenneth B. Mason, Jr.

2. The name of the real party in interest represented by me is:

   None

3. The parent companies, subsidiaries and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are:

   None.

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court of agency or are expected to appear in this Court are:

   Kenneth M. Carpenter
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STATEMENT OF COUNSEL

Based on my professional judgment, I believe this appeal requires rehearing by the Panel in this matter or in the alternative consideration by the *en banc* Court because the Panel decision misread and misapprehended the purpose and meaning of 38 U.S.C. § 5904(d), and further disregards the Secretary's interpretation as found in regulation of 38 U.S.C. § 5904.

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter
Attorney for Appellant
Kenneth B. Mason, Jr.

01-7033

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MITCHELL SCATES, JR.,
Claimant,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,
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v.

KENNETH B. MASON, JR.
Intervenor-Appellant.

APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* AND APPENDIX

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and this Court's Rules, Kenneth B. Mason, Jr. respectfully moves for Panel rehearing and a rehearing *en banc* of the March 13, 2002, decision of the Court affirming the CAVC's decision.

POINTS OF LAW TO BE CONSIDERED

Appellant respectfully submits that the Panel decision of March 13, 2002 misread and misapprehended the purpose, meaning and intent [sic] 38 U.S.C. § 5904(d). The Panel also failed to recognize and consider the interpretation of 38 U.S.C. §§ 5904(c) and (d), made by the Secretary of the Department of Veterans Affairs, in regulation.

The Panel decision fails to recognize the clear differences which exist between fee agreements under 38 U.S.C. §§ 5904(c)(2) and 5904(d). Under § 5904(c)(2), fee agreements are **not limited** as to the fee structure or as to the amount of fee which may be charged **except** that the fees called for may not be **excessive or unreasonable**. Under § 5904(d), fee agreements, must be **contingent in nature** and **limit** the amount of the fee to 20 percent or less, to be **eligible** for **direct payment** from the Secretary. This subsection of the statute provides for **no** review process.

38 U.S.C. § 5904(c)(2) **does provide** for a **review** process for fee agreements covered by that statute. But that review is in the context of whether that fee amount is **excessive or unreasonable**. Section 5904(c)(2) **does not** describe or provide for a **role** for either the Board of Veterans' Appeals **or** the Secretary in the review of fee agreements under § 5904(d). The Panel's decision has, without basis within either § 5904(c)(2) or § 5904(d) affirmed the creation of a review process for § 5904(d) fee agreements under the provisions of § 5904(c)(2).

Mr. Mason does not have, or should be required to make, a "fee claim." He has a fee agreement which conforms with the express provisions of 38 U.S.C. § 5904(d). There is nothing in the plain language of § 5904(c)(2) or the relevant regulations which describes or otherwise characterizes any proceeding under the statute or regulation in terms of a "attorney fee dispute" or "attorney fee claim," particularly as regards § 5904(d) fee agreements. To the contrary, the language of § 5904(c)(2) describes **only** a limited role for the Board of Veterans' Appeals, in fee agreements generally and describes **no role** for the Board regarding review of § 5904(d) fee agreements.

The Panel in its discussion of 38 U.S.C. § 5904(d) notes the "limit [of] the total fee payable to an attorney to twenty percent of the 'past-due benefits awarded.'" *Mason* slip op. at 5. However, 38 U.S.C. § 5904(c)(2) **does not** limit the amount of the percentage of the fee from past-due benefits which may be charged by an attorney. *See* 38 C.F.R. § 20.609(e). The **only** constraining criteria regarding the amount of fee **expressly** set out in § 5904(c)(2) is that the fee "called for in the agreement" be either "excessive or unreasonable." But, this pertains to fee agreements entered into under § 5904(c)(2) and **not** fee agreements entered into under § 5904(d). Compare the statutorily created limitations imposed on fee agreements under § 5904(d), to the Secretary's interpretation of § 5904(c)(2) fee agreements, in regulation at 38 C.F.R. § 20.609(e) which **permit** fees for services to be based on a "fixed fee, hourly rate, a percentage of benefits recovered or a combination of such bases." Clearly under this regulation the Secretary **does not interpret** § 5904 to "limit the total fee payable to twenty percent of past-due benefits."

The Panel has **overlooked** the Secretary's interpretation of the statute found in 38 C.F.R. § 20.609(e). Contrary to the Panel's conclusion regarding the imposition of a specific limitation by statute on the amount of the total fee, § 5904(c)(2) requires **only** that the fees charged "must be reasonable." The Secretary's interpretation of the statute conflicts with the Panel decision's interpretation that the statute "thus limits the total fee payable to an attorney to twenty percent of 'past-due benefits awarded.'" *Mason* slip op. at 5.

The Panel's decision further misreads the intent and purpose of the statutory scheme set out in 38 U.S.C.

§ 5904(d). 38 U.S.C. § 5904(d) is **separate** and independent of § 5904(c)(2). A § 5904(d) fee agreement does not require review of the **amount of the fee called for** in the fee agreement as described in 38 U.S.C. § 5904(c)(2), because § 5904(d) sets the amount and limit of the fee.

38 U.S.C. § 5904(d) provides for the **direct payment** by the Secretary of a contingent fee of twenty percent or less from an award of past-due benefits. Congress created the **direct payment** provisions, in § 5904(d), as an inducement to attorneys, **but** requires that attorneys **limit** the amount of the fee to be charged to a veteran for representation and that the fee agreement must be **contingent**. The express purpose of this statute was to encourage attorney representation of veterans under statutorily described terms, in consideration for the Secretary providing for the **direct payment** of the attorney fees from the award of past-due benefits.

38 U.S.C. § 5904(d)(2)(A) expressly describes the terms and conditions of the fee agreement referred to in Paragraph 1 of this subsection as follows:

> (i) The amount of the fee payable to the attorney **is to be paid to the attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim**, and
>
> (ii) The amount of the fee **is contingent** on whether or not the matter **is resolved in a manner favorable to the claimant**. (Emphasis added)

38 U.S.C. § 5904(d)(2)(B) states for purposes of subparagraph (A):

> a claim **shall be considered to have been resolved in a manner favorable to the claimant if all or any part of the relief sought is granted**. (Emphasis added)

38 U.S.C. § 5904(d)(3) concludes that to the extent that past-due benefits are awarded **in any proceeding** before the Secretary, before the Board, or before the Court, the Secretary may **direct** that payment of any attorney fees under the fee agreement described in Paragraph 1 of this subsection.

The Appellant entered into a fee agreement with the veteran which conformed with the provisions of 38 U.S.C. § 5904(d). The CAVC in its *en banc* decision created out of whole cloth a procedure for the review of § 5904(d) fee agreements which **does not exist** within the statutory scheme. The plain language of 38 U.S.C. § 5904(d) **does not** provide any authority or any support for the proposition that a veteran, who has entered into a fee agreement which conforms with § 5904(d), has the right at the time of the award of past-due benefits to challenge the attorney's right to charge the fee called for in that fee agreement under 38 U.S.C. § 5904(c)(2).

This Panel in affirming the CAVC's decision, states:

> Because that percentage was less than contingent fees typically found in other areas of practice, Congress gave lawyers the offsetting benefit of certainty of collection; it provided for the Department to withhold that percentage from the benefits awarded and itself pay the fee directly to the lawyer. *Scates* slip op. at 6.

This statement is not supportable by the plain language of 38 U.S.C. § 5904(d). Section 5904(d) provides for **direct**

payment by the Agency to the attorney. There is nothing in the plain language of 38 U.S.C. § 5904(c)(2) which authorizes the review of § 5904(d) fee agreements. Section 5904(d) contemplates **only** that the Secretary will make a **direct payment** of fees earned by the attorney from the award of past-due benefits.

Clearly, Congress provided authority to both the Court and the Board to review "the amount of the fee called for in a fee agreement" for a determination of whether such fee was "excessive or unreasonable." *See* 38 U.S.C. § 5904(c)(2) and 38 U.S.C. § 7263(d). However, there is nothing in the plain language of either 38 U.S.C. §§ 5904(c)(2) and (d) which implicate or otherwise mandate the review of a § 5904(d) fee agreement under § 5904(c)(2).

The Panel's decision offers no authority for its conclusion that Congress intended the review of a § 5904(d) fee agreement under § 5904(c)(2) in order to address the impact of the attorney's "discharge by the client before the case is completed" or whether the fee **agreed to** by the veteran under § 5904(d) "fairly and accurately reflects his (the attorney's) contribution to and responsibility for the benefits awarded." *Mason* slip op. at 6-7. 38 U.S.C. § 5904(d) provides for the **direct payment** of attorney fees by the Secretary out of past-due benefits of the claimant. It does not provide for or otherwise contemplate an "attorney fee dispute" process or a process involving a claim for "attorney fees." There simply is no authority within the text of § 5904(d) for a claimant to challenge a statutorily created fee agreement, voluntarily entered into, under the terms and conditions set out in 38 U.S.C. § 5904(d).

The fee agreement to be entered into by a veteran/claimant with an attorney under 38 U.S.C. § 5904(d) is clearly and precisely as defined by that statute. 38 U.S.C. § 5904(d)(1) states:

> When a claimant and an attorney **enter into a fee agreement** described in paragraph 2 of this subsection, the **total fee payable** may not exceed 20 percent of the total amount of past-due benefits awarded on the basis of the claim. (Emphasis added)

This statute must be read as **binding** on both the claimant and the attorney. The attorney is required by the statute to conform the compensation called for in the fee agreement to be **both** contingent and in an amount not to exceed 20 percent of the total past-due benefits. Equally, the claimant **has contractually agreed** to pay to the attorney **up to** 20 percent of the past-due benefits **awarded** on the basis of the claim. The creation of an attorney fee claim or dispute process is **inconsistent** with the plain language of the statute. An attorney fee claim or dispute process would necessarily **modify** the legal liability of the claimant as provided for under § 5904(d) to allow the Secretary to make **direct payment** to the attorney of the **agreed upon** fee.

The question presented by the Appellant in appealing the *en banc* decision of the CAVC was whether there was statutory authority for the Department of Veterans Affairs to undertake an "attorney fee dispute" process or an "attorney fee claim" process. In this regard, the Panel concludes:

> Thus, the Board has jurisdiction over appeals involving contingent fee contracts under which the attorney is to receive up to "20 percent of the

> amount of any past-due benefits awarded on the basis of the claim" and the Secretary is to pay that fee to the attorney out of those benefits. *See* 38 U.S.C. § 5904(d)(1)(2)(A)(i), (ii). *Mason* slip op. at 7.

This conclusion misapprehends and misunderstands the purpose of the Board's jurisdiction under 38 U.S.C. § 5904(c)(2). The purpose of § 5904(c)(2) is to review fee agreements **other than** those entered into under § 5904(d). Congress **expressly limited** the Board's jurisdiction to include **only** "the fee called for in the agreement," and **expressly directs** that the focus of such inquiry shall be on whether "that fee is **excessive or unreasonable**." The fee **called for** in a § 5904(d) fee agreement is presumed reasonable.

The Panel decision commits the same error as the *en banc* Court of the CAVC. Both decisions have made the **unwarranted leap** from 38 U.S.C. § 511(a) to 38 U.S.C. § 5904(c)(2) to mean that § 5904(d) fee agreements are subject to review under § 5904(c)(2). This contention is supported by the Secretary's interpretation of the statute, as found in 38 C.F.R. § 20.609(e), fees are permitted to be charged at a "fixed fee, hourly fee, a percentage of benefits recovered, or a combination of such bases." As a consequence, it is those fee agreements, as otherwise permitted and described in VA regulation, which are to be **reviewed** under § 5904(c)(2). Section 5904(c)(2) fee agreements are **distinguishable** from the fee agreements entered into for **direct payment** by the Secretary under § 5904(d). Section 5904(c)(2) fee agreements are **distinguishable** because they are based upon: an hourly rate, a fixed fee, a

contingent fee in excess of twenty percent, or a combination of any or all of these bases. These are fee agreements which **do not** involve **direct payment** by the Secretary.

The Panel's decision states that "The line between (1) entitlement to and (2) reasonableness and excessiveness of attorney fees may not be as clear and bright as the Veterans Court believed." *Mason* slip op. at 8. This statement is inconsistent with the plain language of 38 U.S.C. § 5904(c)(2), because that section of the statute **makes no reference to** "entitlement to" and deals **expressly and only with** the question of whether the fee called for is **excessive or unreasonable**. The "entitlement" to charge a fee is inherent in the terms prescribed in § 5904(d) by Congress. The statutory purpose for the review of a non-§ 5904(d) fee agreement, which may by VA regulation exceed twenty percent of the total past-due benefits, is to **insure** that the fees charged are neither **excessive nor unreasonable**. Mr. Mason **obtained** the relief sought by the veteran in his appeal to the CAVC. Specifically, the Board of Veterans' Appeals decision, which had been appealed by the veteran to the CAVC, would have become **final** but for the Appellant's success in vacating that Board decision and obtaining a Court ordered remand. *See* 38 U.S.C. §§ 5904(d)(2)(A) and (B). As a result of Mr. Mason's representation, the veteran was awarded past-due benefits. Consistent with the provisions of 38 U.S.C. § 5904(d)(3), the resulting award of past-due benefits **entitled** Mr. Mason to the **direct payment** of his fee by the Secretary.

The current Panel decision provides **no basis** within the statutory scheme or within existing VA regulations to support the legal conclusion that the **direct payment** of fees described in § 5904(d) are subject to a request for

review under 38 U.S.C. § 5904(c)(2). To further demonstrate this point, the Appellant directs the Court's attention to 38 C.F.R. § 20.609(f) which states in pertinent part:

> Fees which total **no more than** twenty percent of past-due benefits awarded as defined in paragraph (h)(3) of this section, **will be presumed to be reasonable**. (Emphasis added)

38 C.F.R. § 20.609(h) describes, "Payment of fees by Department of Veterans Affairs **directly** to an attorney-at-law from past-due benefits." Both of these regulations constitute the Secretary's **interpretation of** 38 U.S.C. § 5904(d) and by implication § 5904(c)(2).

Contrary to the Panel's decision, the Secretary's **interpretation** of the statutory scheme **does not contemplate** or otherwise authorize the Board of Veterans' Appeals to conduct a review of a **direct payment** fee agreement under 38 U.S.C. § 5904(d). The Secretary's **regulatory presumption** that a fee of twenty percent or less, as is required of the fee called for in a **direct payment fee agreement**, as described in 38 C.F.R. § 20.609(h)(3), **negates** any need for **any review** of such a § 5904(d) fee agreement under 38 U.S.C. § 5904(c)(2). This is true because the "fee called for" in the **direct payment** fee agreement is **presumptively reasonable**. Additionally, the Secretary has created **no regulatory provision** authorizing the Board of Veterans' Appeals to undertake a review of a **presumptively reasonable fee**.

This Panel's decision relies on the fact that § 5904(c)(2) authorizes the Board to review fee agreements. The opinion then **infers** that, "The Regional Office proceeding in the present case would be similar to such Board proceeding under § 5904(c)(2), **although the**

statute does not expressly provide for that proceeding." *Mason* slip op. p. 11. (Emphasis added)

The Panel concludes, "There is no reason to believe that Congress intended to preclude the claimant from participating in the Regional Office proceeding and the Veterans' Court did not err in permitting such participation." *Mason* slip op. p. 11. It is equally true that there is **no reason** to believe that Congress **intended** to include claimants in a proceeding before the Regional Office which was not **expressly provided for** by any statute. Congress must be assumed by this Court to be capable of articulating such intent, and it is error for this Court to impute such intent.

Further, under 38 C.F.R. § 20.609(i) the Secretary has clearly interpreted the Board proceedings described in 38 U.S.C. § 5904(c)(2). Section 20.609(i) refers the Board to the criteria for **reasonableness** set out in § 20.609(e). 38 C.F.R. § 20.609(i) **expressly** requires that a motion "set forth the reason, or reasons why the fee called for in the fee agreement is **excessive or unreasonable.**" (Emphasis added) Section 20.609(i) **does not** refer to the need for a review process for a **presumptively reasonable** contingent fee, because such a review process is unnecessary. It is unnecessary because the Secretary in § 20.609(f) necessarily interprets the fee called for in a § 5904(d) fee agreement, as being **presumptively reasonable**. The Secretary's interpretation of § 5904(c)(2), in this regulation, supports the Appellant's position that § 5904(d) fee agreements are not intended or required to be reviewed by the Board under § 5904(c)(2). It is the Agency's interpretation of the statute which must be deferred to by this Court. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Both the *en banc* CAVC and this Panel decision have attempted to interpret 38 U.S.C. § 5904(c)(2) without recognizing the Secretary's interpretation of that statute in regulation.

CONCLUSION

The Appellant, for the foregoing reasons, urges the Panel to withdraw the Panel decision in this matter and to rehear this matter. In the alternative, the Appellant urges the Full Court to reconsider this matter *en banc* in light of the precedential questions of exceptional importance presented in this matter.

Respectfully submitted,

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The undersigned hereby certifies that the original and fifteen copies of the above and foregoing document has been shipped by overnight delivery to the Clerk and two copies to the below named counsel for Appellee on the 19th day of April, 2002, addressed to:

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01-7033

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MITCHELL SCATES, JR.,
Claimant-Appellee,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,
Respondent-Appellee,

v.

KENNETH B. MASON, JR.,
Intervenor-Appellant.

Appeal from the United States Court Of Appeals For Veterans Claims in 97-875, Chief Judge Frank Q. Nebeker

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RESPONSE TO INTERVENOR-APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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38 U.S.C. § 5904(c) ..... **passim**

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RESPONSE TO INTERVENOR-APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-7033

MITCHELL SCATES, JR.,

Claimant-Appellee,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee,

v.

KENNETH B. MASON, JR.,

Intervenor-Appellant.

In response to this Court's request and pursuant to Rules 35(e) and 40(a)(3) of the Rules of Appellate Procedure and Rules 35(e)(4) and 40(d) of the Federal Circuit Rules, respondent-appellee Anthony J. Principi, Secretary of Veterans Affairs, respectfully responds to intervenor-appellant Kenneth B. Mason's April 19, 2002 Petition for Panel Rehearing and Rehearing En Bane.[1]

Statement of the Case

Mr. Mason seeks review of the decision by a panel of this Court: *Scates v. Principi v. Mason*, 282 F.3d 1362 (Fed. Cir 2002). In that decision, the panel held that Mr. Mason, who had a contingent-fee contract for payment of twenty percent of past-due veterans benefits awarded and was discharged by Mr. Scates before the case was completed, is not automatically entitled to the full twenty-percent fee. Rather, the panel held that, pursuant to 38 U.S.C. § 5904(c), Mr. Mason may receive only a fee that fairly and accurately represents his contribution to and responsibility for the benefits awarded. *Id.* at 1366. The panel further held that a Department of Veterans Affairs (VA) regional office is the appropriate entity to decide in the first instance Mr. Mason's claim for attorney fees. *Id.* at 1368.

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[1] Mr. Mason's petition appears not to comply with Federal Circuit Rule 35(b)(2)'s requirements for a petition for rehearing *en banc*. That rule requires a petition for rehearing *en banc* to contain at least one of two statements by counsel. If, as here, the petitioner has not cited decisions contrary to the decision for which rehearing is being sought, the petition must set forth a "precedent-setting question[] of exceptional importance." Fed. Cir. R. 35(b)(2). The Statement of Counsel on page v of Mr. Mason's petition does not state any precedent-setting question of exceptional importance.

Finally, the panel also held that Mr. Scates may participate in the regional office proceedings upon Mr. Mason's attorney-fee claim. *Id.* at 1369.

ARGUMENT

I. Mr. Mason Ignores The Panel's Holding "That Implicit In [The Fee Agreement] Was the Understanding That Mason's Right to Receive the Full Twenty Percent Of Past Due Benefits Would Arise Only If Mason Continued As Scates' Attorney Until The Case Was Successfully Completed"

In his petition, Mr. Mason argues against the panel's reading of the pertinent statutes and regulations providing for review of fees agreements, but he completely fails to address the panel's antecedent holding which necessitate a procedure for review of those agreement [sic]. Interpreting both the Mason-Scates fee agreement at issue here and the pertinent statutes and regulations, the panel held as follows:

> Read in context and in the light of the statutory provisions governing the payment of attorney fees in veterans benefits cases, however, we conclude that implicit in this arrangement was the understanding that Mason's right to receive the full twenty percent of past due benefits would arise only if Mason continued as Scates' attorney until the case was successfully completed. If, as here, the veteran terminated the lawyer's services during the case and retained a substitute representative, the first lawyer's fees would be based upon and fairly reflect that lawyer's contribution to the case.

Id. at 1365.

As the panel noted, under Mr. Mason's interpretation of section 5904, if a veteran terminated an attorney's services in the middle of the case, that original attorney would be entitled to the twenty percent maximum fees, no matter what the circumstances. Indeed, consistent with Mr. Mason's argument in his petition and suggestion, an attorney who performed no services whatsoever after the execution of a fee agreement qualifying under subsection 5904(d) and termination of his representation would be entitled to payment from the VA of the full 20 percent maximum fee. The panel properly rejected Mr. Mason's reading of the statute that would reach such an absurd result. While section 5904(d) permits a fee as high as 20 percent of past-due benefits, and 38 C.F.R. § 20.609(f) presumes such a fee to be reasonable, obviously situations may arise, such as this case, in which a twenty-percent fee may not be reasonable.

In interpreting the fee agreement between Mr. Mason and Mr. Scates, the panel noted and relied upon the congressional intent to protect veterans from excessive fees while at the same time encouraging representation. Id. at 1366. Mr. Mason's reading of the statute so that there is no provision for a reasonableness review of attorney fee agreement pursuant to subsection 5904(d) obviously would frustrate that congressional intent. Moreover, as we demonstrate below, Congress explicitly provided for review of all fee agreements governed by 38 U.S.C. § 5904 for reasonableness and Mr. Mason's arguments have no merit.

II. Subsection 5904(c) Applies To Fee Agreements Qualifying For Payment Under Subsection 5904(d)

As the panel properly held, the provisions of subsection 5904(c) providing for review of fee agreements for reasonableness applies to all section 5904 fee agreements, including those qualifying for direct payment under subsection 5904(d).

Mr. Mason asserts that the panel of this Court misinterpreted 38 U.S.C. § 5904(c) and (d) by remanding this case for an administrative hearing on Mr. Mason's attorney-fee claim. Petition 2, 5. He argues that a fee agreement calling for the payment of fees to the attorney by the VA directly from past-due benefits awarded (a "direct-pay agreement"), which is authorized by subsection (d), is not subject to review by the Board of Veterans' Appeals (BVA), which review is authorized by subsection (c). Petition 3. Under his interpretation, subsections (c) and (d) govern mutually exclusive categories of fee agreements: direct pay agreements, govern solely by subsection 5904(d), and all other agreements.

We are unaware of any language in 38 U.S.C. § 5904 or its legislative history that even suggests that Congress intended for subsection (c) not to apply to fee agreements qualifying for direct payment pursuant to subsection 5904(d). If both subsections (c) and (d) are read together, as they must be to correctly determine their meaning, *see Smith v. Brown*, 35 F.3d 1516, 1522-23 (Fed. Cir. 1994), it is clear that direct-pay agreements, which are authorized by subsection (d), constitute a special category of fee agreements, which in general are authorized and governed by subsection (c).

The plain language of section 5904 provides for review of all section 5904 fee agreements. Subsection 5904(c)(1) specifies the services for which an attorney may charge a fee in connection with a claim proceeding before the VA; by its express terms subsection 5904(c)(1) applies to all fees [sic] agreements in connection with claim proceedings before the VA, including to direct-pay agreements. Subsection (c)(1) prohibits the charging, allowance, or payment of fees for services of agents or attorneys provided before the date on which the BVA first makes a final decision in the case. Subsection (c)(1) permits the charging, allowing, or payment of fees for agent or attorney services provided after the date the BVA first makes a final decision in the case but only if the agent or attorney is retained within one year after that date.

Subsection (c)(2) further requires any person who, acting as agent or attorney, represents a person in a claim proceeding before VA or the BVA after the BVA first makes a final decision in the case to file with the BVA a copy of any fee agreement between them. Subsection (c)(2) then authorizes the BVA to review the filed agreement and order a reduction in the fee called for if the BVA finds the fee to be excessive or unreasonable.

Subsection (d)(3) authorizes the Secretary to direct payment of attorney fees out of past-due benefits. To qualify for such payment, a fee agreement must meet certain requirements specified in paragraphs (1) and (2) of subsection (d). Those requirements include that the total fee may not exceed twenty percent of the total amount of any past-due benefits awarded upon the claim and that the total amount of the fee payable be contingent upon whether or not the matter is resolved in a manner favorable to the claimant.

Pursuant to this statutory scheme, an attorney may charge a reasonable fee only for services provided after the first final BVA decision in the case, and an attorney who so represents a claimant before the VA must file with the BVA a copy of any fee agreement between the attorney and the claimant. In addition, the attorney may arrange to have the VA pay the fee directly from past-due benefits, but direct-pay agreements are subject to two additional requirements: a maximum fee of twenty percent of past-due benefits awarded and the total fee contingent upon an outcome favorable to the claimant.

A direct-pay agreement is a fee agreement between the VA claimant and an attorney, and if the agreement covers representation of the claimant before the VA after the BVA first makes a final decision in the case, then it is an agreement that must be filed with the BVA under the plain language of subsection (c)(2). No language in either subsection (c) or (d) suggests that Congress intended direct-pay agreements to be exempt from subsection (c)(2)'s filing requirement. Furthermore, all fee agreements required to be filed with the BVA are subject to the BVA's review. No statutory language exempts direct-pay agreements from the BVA's review under subsection (c)(2). The statutory language is devoid of any suggestion of congressional intent to exempt direct-pay agreements from the generally applicable provisions of subsection (c). The panel decision is entirely consistent with the plain language of the statute.

No administrative or judicial decision of which we are aware has ever suggested the interpretation. of 38 U.S.C. § 5904 advanced by Mr. Mason. Mr. Mason offers no authority whatsoever in support of his tortured interpretation of the statute. Rather, Mr. Mason asserts that "[t]he

'entitlement' to charge a fee is inherent in the terms prescribed in [section] 5904(d) by Congress." Petition 11. He is wrong. The entitlement to charge a fee can be determined only by reference to subsection (c). Congress clearly has prohibited any attorney from charging for services rendered before the date the BVA first makes a final decision in the case or if the attorney was retained more than one year after that date (for representation before the VA). 38 U.S.C. § 5904(c)(1).

Subsection 5904(c) clearly provides certain limitations upon fee agreements and for concurrent review. The plain language of subsection 5904(c) refutes Mr. Mason's contention that Congress provided for attorneys to circumvent the prohibitions of subsection 5904(c), including review for "reasonableness," by using a direct-pay agreement.

III. The VA Interprets 38 U.S.C. § 5904 as Requiring Direct-Pay Agreements To Be Filed With The Board And To Be Subject To The Board's Review For Reasonableness Of The Fee

The VA interprets 38 U.S.C. § 5904 as requiring fee agreements providing for direct payment to attorneys pursuant to subsection 5904(d) to be filed with the board and to be subject to the board's review for reasonableness of the fee. 38 C.F.R. § 20.609.

Mr. Mason also asserts that the panel's decision conflicts with the VA's interpretation of section 5904. Petition 4, 10. He maintains that the VA's interpretation supports his position and suggests that the panel failed to defer to the VA's interpretation. Petition 15. Mr. Mason is wrong. The VA interprets section 5904(c) and (d) to permit BVA review of a direct-pay agreement, and the VA's

implementing regulation, 38 C.F.R. § 20.609, manifests that interpretation.

First, section 20.609(g) requires that "[a]ll agreements for the payment of fees for services" of attorneys or agents be filed with the BVA, without regard to whether an agreement calls for payment out of past-due benefits. Also, paragraph (4) of section 20.609(h), which governs direct-pay agreements, specifies that an attorney must notify an agency of original jurisdiction of the existence of a direct-pay agreement "[i]n addition to filing a copy of the fee agreement with the Board . . . as required by paragraph (g). Clearly, the VA interprets section 5904(c) and (d) to require that direct-pay agreements be filed with the BVA.

Furthermore, section 20.609(h)(1) specifies that a claimant and an attorney may enter into an agreement that the VA will pay fees out of past due benefits "subject to the requirements of the other paragraphs of [section 20.609], including paragraphs (c) and (e)." Paragraph (c) provides the circumstances under which fees may be charged, and paragraph (e) governs the reasonableness of fees, listing factors to be considered in determining whether a fee is reasonable. Thus, under the VA's interpretation of section 5904, a direct-pay agreement may call for a fee equal to as much as twenty percent of awarded past-due benefits but is also subject to BVA review to determine whether the fee called for is reasonable under the circumstances.

Although fees totaling no more than twenty percent of awarded past-due benefits are presumed under section 20.609(f) to be reasonable, that presumption is rebuttable. *In re Fee Agreement of Vernon*, 8 Vet. App. 457, 459 (1996). Section 5904(d)(1) imposes a cap upon the amount of

attorney fees that a direct-pay agreement may call for, but it does not require that full amount of fees be paid regardless of the circumstances of the case. Furthermore, section 20.609(1), which governs the BVA's review of fee agreements, authorizes the BVA to review "a fee agreement between a claimant or appellant and an attorney-at-law or agent" without any language to indicate that direct-pay agreements are excluded. The panel's decision thus is entirely consistent with the VA's interpretation of section 5904.

CONCLUSION

This Court should deny Mr. Mason's Petition for Rehearing and Rehearing En Banc, because the panel's decision is consistent both with the plain language of 38 U.S.C. § 5904 and with the VA's interpretation of section 5904.

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